Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05(HC)-304–12 OF 2019(B), 05(HC)-308–12 OF 2019(B), 05(HC)-303–12 OF 2019(B), 05(HC)-305–12 OF 2019(B), 05(HC)-307–12 OF 2019(B) AND 05(HC)-7–01 OF 2020(W)

ABANG ISKANDAR (SABAH AND SARAWAK), NALLINI PATHMANATHAN, VERNON ONG, ZABARIAH YUSOF AND HASNAH HASHIM FCJJ

19 FEBRUARY 2021

Constitutional Law — Legislation — Validity of impugned legislation — Ouster clause — Whether s 15B(1) of the Prevention of Crime Act 1959 ('POCA') was unconstitutional for precluding judicial review of decisions of Prevention of Crime Board under POCA in ordering persons to be detained without trial — Whether s 15B(1) infringed art 4(1) of the Federal Constitution ('the FC') by preventing court from determining constitutionality of the POCA and striking it down if necessary — Whether fact that POCA was enacted pursuant to art 149 of the FC did not immunise POCA from being scrutinised for its constitutionality — Whether s 15B(1) infringed art 121(1) of the FC by curtailing judicial power and also violated doctrine of separation of powers and 'basic structure' of the FC

The six appellants herein all sought writs of habeas corpus for release from detention after their applications for the same was refused by the High Court. The appellants were ordered to be detained for two years at various detention centres by the Prevention of Crime Board ('the Board') under s 19A(1) of the Prevention of Crime Act 1959 ('the POCA'). POCA was enacted pursuant to art 149 of the Federal Constitution ('the FC') to deal with persons involved in various types of crimes particularly in gang and terrorist activities, drug and human trafficking, smuggling of migrants, unlawful gaming and unlawful societies. Article 149 of the FC allowed Parliament to make laws for the protection of national security and public order even though those laws were inconsistent with the fundamental liberties guaranteed under arts 5, 9, 10 or 13 of the FC. The issue in the instant appeals was whether s 15B(1) of the POCA was constitutional. The section provided that no act or decision of the Board was judicially reviewable unless it concerned a question of non-compliance with any procedural requirement relating to such act or decision. The appellants submitted that s 15B(1) was unconstitutional for barring the court from reviewing whether detentions ordered by the Board were valid. By so doing, it was alleged that s 15B(1) infringed art 4(1) of the FC which declared any pre-Merdeka law that was inconsistent with the FC as void. The appellants

claimed that s 15B(1) also infringed the judicial power of the courts under art 121(1), curtailed a detainee's access to justice under art 5(1) and violated both the basic structure of the FC and the doctrine of separation of powers. The appellant, Nivesh Nair a/l Mohan, raised the additional ground that the respondents had failed to show that all the members of the Board validly held their tenure of office under s 7B of the POCA when the detention order in his case was made. In submitting that s 15B(1) was constitutional, the respondents said the question of whether the facts upon which a detention order under POCA was made was sufficient or relevant was a matter of policy within the province and discretion of the Executive and was not subject to question in any court of law on grounds of national security.

Held, by majority, dismissing all the appeals:

(1) **(per Nallini Pathmanathan FCJ, dissenting)** Section 15B of the POCA was unconstitutional and had to be struck down for being inconsistent with art 4(1) of the FC. Article 4(1) empowered the court to scrutinise any post-Merdeka law and declare it void if it was inconsistent with the FC. By precluding the court from reviewing any act or decision of the Board and thereby preventing the court from determining the constitutionality of the impugned legislation, s 15B contravened art 4(1) itself and defeated the very objective and purpose of that article and rendered it otiose. For that reason, s 15B was null and void. The fact that POCA was enacted pursuant to art 149 of the FC did not make the impugned legislation immune from challenge or scrutiny under art 4(1). Section 15B was ordinary law and was subject to scrutiny under art 4(1). Article 149 only authorised the suspension of fundamental rights in arts 5, 9, 10 and 13 of the FC but did not suspend arts 4, 5, 121 and 151 (see paras 58–59, 62–68, 74, 102(d), 173, 212–213 & 218).

(2) **(per Nallini Pathmanathan FCJ, dissenting)** The judicial power of the superior courts was not circumscribed by federal law; rather, they had inherent judicial power as provided for under arts 4(1) and 121 of the FC. The drafters of the FC clearly intended the Judiciary to be constitutionally empowered to review legislative and executive acts. The Judiciary was to be vested with sufficient powers to determine a challenge on federal law. The notion that federal law could circumscribe judicial power or oust it entirely ran contrary to the intent and express provisions of art 4(1) and 121 of the FC. Article 4(1) would prevail over such ouster clauses as s 15B(1) and render them ineffectual. Such ouster clauses encroached upon judicial power and injured the doctrine of separation of powers and the Rule of Law (see paras 71–73, 82 & 198–199).

(3) **(per Nallini Pathmanathan FCJ, dissenting)** Parliament could not enact any law and expect the courts to exercise their judicial power in accordance with such law, no matter its content and no matter whether it

conformed to the FC or not. The courts would only act in accordance with constitutionally valid federal law, where the role of ascertaining constitutional validity fell upon them under art 4(1). The court's power to review for constitutionality remained intact under art 4(1) despite the 1988 amendment to art 121 of the FC. Hence, s 15B of the POCA could not possibly have the effect of divesting the court of the power to review legislation for its constitutionality (see paras 121–124).

(4) **(per Nallini Pathmanathan FCJ, dissenting)** Unlike English judicial review jurisprudence, which was based on parliamentary sovereignty and the ascertainment of Parliamentary intent in legislation and whether Ministerial acts had been effected in accordance with that intent, it was open to the courts in Malaysia to not only examine the exercise of Ministerial discretion but to also examine and declare void, if necessary, legislation that was inconsistent with the FC. Ultimately, the purpose of art 4(1) of the FC was to ensure that both procedurally and substantively, not only was the impugned legislation constitutionally enacted but also that Ministerial discretion thereunder was constitutionally exercised or exercised in accordance with administrative law principles. In carrying out this exercise, the courts were bound to balance the fundamental liberties accorded in Part II of the FC against the national security needs of the country (see paras 149–153).

(5) **(per Zabariah Mohd FCJ, majority)** Section 15B(1) of POCA was constitutional and valid. It was not unconstitutional by virtue of art 4(1) of the FC. It could not be said that by limiting the court's review power in s 15B, Parliament had encroached upon the jurisdiction of the courts, or that the Legislature had usurped judicial power. It was Parliament that had conferred the court with that jurisdiction and power. The court exercised its powers as provided by POCA, a federal law, which was precisely what art 121(1) of the FC provided (see paras 319 & 322).

(6) **(per Zabariah Mohd FCJ, majority)** Section 15B was not ultra vires art 121(1) of the FC for limiting the exercise of judicial power under that section. Article 121(1) declared that the courts had such jurisdiction as was conferred upon them by or under federal law. And s 15B, being a federal law, gave the court the power to judicially review only matters relating to procedural non-compliance. It was therefore wrong for the appellants to contend that s 15B encroached upon or suppressed judicial power given to the courts under art 121(1) and breached the doctrine of separation of powers (see paras 327, 329, 357 & 474).

(7) **(per Zabariah Mohd FCJ, majority)** In order for s 15B to be struck down as unconstitutional under art 4(1) of the FC, the appellants had to show which provision of the FC the impugned section was inconsistent with. This they failed to do. They merely submitted that it was unconstitutional by virtue of art 4(1). But that was not how art 4(1)

operated. Article 4(1) declared the FC to be the supreme law of the Federation and that any law passed after Merdeka Day which was inconsistent with the FC was, to the extent of the inconsistency, void (see paras 283 & 320).

(8) **(per Zabariah Mohd FCJ, majority)** The appellants had not shown how POCA or the exercise of power under it was arbitrary and unsupportable. The purpose and policy of POCA was to address the worrying rise in the crime index, particularly in organised crime or crimes by a substantial body of persons which posed a threat to public order and economic wellbeing of the country. Article 149 gave Parliament the legislative power to enact POCA with the effect of curtailing fundamental liberties guaranteed under arts 5, 9, 10 and 13 of the FC. Parliament was in a better position to decide on social policy matters rather than the courts. Parliament represented the will of a democratically-elected majority and hence its decision ought to be accepted as legitimate. The courts, in contrast, were in no position to determine on policy matters (see paras 296, 298 & 473).

(9) **(per Zabariah Mohd FCJ, majority)** The satisfaction of the Executive on the sufficiency of allegations of fact upon which a detention order was based was subjective and it was not open for the court to examine the sufficiency of those allegations. Allegations of facts dealt with matters within the province of national policy in relation to the security of the nation whereby the subjective satisfaction of the Executive on those allegations could not be substituted by an objective test in a court of law (see para 362).

(10) **(per Zabariah Mohd FCJ, majority)** The doctrine of the 'basic structure' of the FC was not applicable in construing the constitutionality of s 15B of the POCA. The concept of basic structure might be applicable where the impugned legislation sought to amend the FC, but that was not the case here. There was nothing stated in the FC as to which provision in the FC formed its basic structure. To challenge the constitutionality of s 15B, it had to be tested against any of the provisions of the FC and not against the concept of 'basic structure' (see paras 417 & 470).

(11) **(per Zabariah Mohd FCJ, majority)** The appellant Nivesh Nair a/l Mohan failed to show that there had been any non-compliance with procedural requirements, specifically with regard to s 7B of the POCA. The positive averments made by the Chairman of the Board in his affidavit with regard to the constitution of the Board were never challenged or rebutted by the said appellant (see paras 462 & 468).

[Bahasa Malaysia summary

Keenam-enam perayu di sini memohon untuk writ habeas corpus untuk dilepaskan dari tahanan selepas permohonan mereka untuk perkara yang sama ditolak oleh Mahkamah Tinggi. Perayu diperintahkan untuk ditahan untuk tempoh dua tahun di beberapa pusat tahanan oleh Lembaga Pencegahan Jenayah (Lembaga tersebut) dibawah s 19(A)(1) Akta Pengecahan Jenayah 1959 ('APJ'). APJ telah digubal selaras dengan perkara 149 Perlembagaan Persekutuan ('PP') untuk berurusan dengan semua individu yang terlibat dengan pelbagai jenis jenayah terutamanya kegiatan berkumpulan dan pengganas, permerdagangan manusia dan dadah, penyeludupan migran, perjudian dan kumpulan tidak sah. Perkara 149 PP membenarkan parlimen untuk membuat undang-undang adalah untuk melindungi keselamatan negara dan ketenteraman awam walaupun undang-undang tersebut tidak konsisten dengan kebebasan asasyang diberikan dibawah perkara 5, 9, 10 atau 13 PP. Isu dalam kesemua rayuan disini adalah sama ada s 15B(1) APJ tidak berpelembagaan. Seksyen ini memperuntukan bahawa tiada pelakuan atau keputusan Lembaga tersebut boleh dilakukan semakan kehakiman kecuali mana ianya melibatkan persoalan ketidakpatuhan dengan apa-apa keperluan prosedur berkaitan dengan apa-apa perlakuan atau keputusan. Perayu menghujahkan bahawa s 15B(1) tidak berpelembagaan kerana menghalang mahkamah daripada menyemak sama ada penahanan yang diperintahkan Lembaga tersebut adalah sah. Dengan berbuat sedemikian, mereka mengatakan bahawa s 15B(1) melanggar perkara 4(1) PP yang mengisytiharkan bahawa apa-apa undang-undang pra-merdeka yang tidak sah dengan PP adalah tidak sah. Perayu mengatakan bahawa s 15B(1) juga melanggar kuasa kehakiman mahkamah dibawah perkara 121(1), mengehadkan capaian tahanan kepada keadilan dibawah perkara 5(1) dan melanggar asas PP dan doktrin pengasingan kuasa. Perayu, Nivesh Nair a/l Mohan, membangkitkan alasan tambahan bahawa responden gagal untuk menunjukkan bahwa semua ahli Lembaga tersebut memegang jawatan mereka secara sah dibawah s 7B APJ apabila perintah penahanan dalam kesnya dibuat. Apabila menghujahkan bahawa s 15B(1) adalah tidak berpelembagaan, responden engemukakan soalan yang sama sama ada fakta yang mana penahanan APJ dibuat adalah memadai atau relevan sebagai satu perkara polisi yang mana bidang kuasa dan budi bicara eksekutif tidak boleh dipersoalkan dalam apa-apa mahkamah atas alasan keselamatan negara.

Diputuskan, secara majoriti, menolak kesemua rayuan

(1) **(oleh Nallini Pathmanathan HMP, menentang)** Seksyen 15B APJ adalah tidak sah dan perlu dibatalkan kerana tidak selaras dengan perkara 4(1) PP. Perkara 4(1) memberi kuasa mahkamah untuk meneliti apa-apa undang-undang selepas merdeka dan mengisytiharkanya tidak sah sekiranya ianya tidak konsisten dengan PP. Dengan menghalang mahkamah daripada menyemak apa-apa pelakuan atau keputusan

Lembaga tersebut, dan dengan itu menghalang mahkamah daripada menentukan keperlembagaan perundangan yang dicabar, s 15B melanggar perkara 4(1) dan menewaskan matlamat dan tujuan Perkara tersebut dan membuatnya ianya lewah. Untuk sebab itu, s 15B adalah tidak sah dan terbatal. Fakta yang mana APJ telah digubal selaras dengan perkara 149 PP tidak membuat undang-undang yang dicabar kebal dariapda cabaran atau pemeriksaan diabwah perkara 4(1). Seksyen 15B adalah satu undang-undang biasa dan tertakluk kepada pemeriksaan dibawah perkara 4(1). Perkara 149 hanya membenarkan penangguhan kebebasan asas dalam perkara 5, 9, 10 dan 13 PP tetapi tidak menggantung perkara 4, 5, 121 dan 151 (lihat perenggan 8–59, 62–68, 74, 102(d), 173, 212–213 & 218)

(2) **(oleh Nallini Pathmanathan HMP, menentang)** Kuasa kehakiman mahkamah atasan tidak terhad oleh undang-undang persekutuan; sebaliknya, mereka mempunyai kuasa kehakiman sedia ada sepertimana diperuntukan dibawah perkara 4(1) dan 121 PP. Adalah jelas bahawa penggubal PP berniat agar badan kehakiman diberi kuasa di sisi perlembagaan untuk menyemak pelakuan eksekutif dan badan perundangan. Tanggapan bahawa undang-undang persekutuan boleh mengehadkan kuasa kehakiman atau mengeluarkannya adalah bertentangan dengan niat dan peruntukan nyata perkara 4(1) dan 121 PP. Perkara 4(1) akan mengatasi melampaui klausa *ouster* seperti s 15B(1) dan menjadikan mereka tidak berkesan. Klausa *ouster* sedemikian melanggar kuasa kehakiman dan mencederakan doktrin pengasingan kuasa dan kedaulatan undang-undang (lihat perenggan 71–73, 82 & 198–199)

(3) **(oleh Nallini Pathmanathan HMP, menentang)** Parlimen boleh menggubal apa-apa undang-undang dan menjangka agar mahkamah menggunakan kuasa kehakiman mereka berdasarkan undang-undang tersebut, tanpa mengira kandungannya dan tanpa mengira sama ada ianya mematuhi PP atau tidak. Mahkamah hanya akan bertindak berdasarkan undang-undang persekutuan yang sah disisi perlembagaan, yang mana peranan untuk menetukan kesahhan perlembagaan jatuh kepada mereka dibawah perkara 4(1) walaupun pindaan 1988 kepada perkara 121 PP. Oleh yang demikian, s 15B APJ tidak boleh memberikan kesan untuk menceraikan mahkamah daripada kuasanya untuk menyemak undang-undang atas soalan keperlembagaan (lihat perenggan 121–124).

(4) **(oleh Nallini Pathmanathan HMP, menentang)** Tidak seperti jurisprudens semakan kehakiman inggeris, yang mana berdasarkan kedaulatan parlimen dan penentuan niat parlimen dalam perundangan dan sama ada perlakuan menteri diberi kesan dengan niat tersebut, ianya terbuka kepada mahkamah di Malaysia, untuk bukan sahaja meneliti

penggunaan budibicara menteri tetapi juga untuk meneliti dan mengisytiharkan tidak sah, sekiranya perlu, perundangan yang tidak sah dengan PP. Akhirnya, matlamat perkara 4(1) PP adalah untuk memastikan bahawa secara prosedur dan secara substantif, bukan sahaja undang-undang yang dicabar tersebut digubal secara sah disisi perlembagaan tetapi juga bahawa budibicara menteri dibawahnya telah digunakan secara sah disisi perlembagaan atau dilaksanakan selaras selaras dengan prinsip undang-undang pentadbiran. Dalam melaksanakan perkara ini, mahkamah akan mengimbangkan kebebasan asas yang diperuntukan dalam Bahagian II PP dengan keperluan keselamatan awam negara (lihat perenggan 149–153).

(5) **(oleh Zabariah Mohd HMP, majoriti)** Seksyen 15B(1) APJ adalah sah disisi perlembagaan. Ianya tidak tidak berpelembagaan selaras dengan perkara 4(1) PP. Ianya tidak boleh dikatakan bahawa dengan menghadkan kuasa mahkamah untuk membuat semakan dalam s 15B, Parlimen telah menceroboh bidang kuasa mahkamah, atau bahawa badan perundangan telah merampas kuasa kehakiman. Ianya merupakan parlimen yang telah memberikan mahkamah bidang kuasa dan kuasa tersebut. Mahkamah telah menggunakan kuasanya sepertimana diperuntukan APJ, satu undang-undang persekutuan, yang mana adalah apa yang telah diperuntukan oleh perkara 121(1) PP (lihat perenggan 319–322)

(6) **(oleh Zabariah Mohd HMP, majoriti)** Seksyen 15B adalah tidak ultra vires perkara 121(1) PP untuk menghadkan penggunaan kuasa kehakiman dibawah seksyen tersebut. Perkara 121(1) mengisytiharkan bahawa mahkamah mempunyai bidang kuasa sedemikian sepertimana yang diberikan kepadanya oleh atau dibawah undang-undang persekutuan. Dan s 15B yang merupakan undang-undang persekutuan, memberi Mahkamah kuasa untuk membuat semakan kehakiman hanya perkara yang berkaitan dengan ketidakpatuhan prosedur. Oleh itu, ianya adalah salah untuk perayu untuk mengatakan bahawa s 15B menceroboh atau menahan kuasa kehakiman yang diberikan kepada mahkamah dibawah perkara 121(1) dan melanggar doktrin pengasingan kuasa (lihat perenggan 327, 329, 357 & 474)

(7) **(oleh Zabariah Mohd HMP, majoriti)** Untuk s 15B diisytiharkan sebagai berpelembagaan dibawah perkara 4(1) PP, perayu perlu menunjukkan peruntukan PP yang mana seksyen yang dicabar tersebut tidak selaras dengan. Perkara ini tidak dilakukan oleh mereka. Mereka hanya menghujahkan bahawa ianya tidak sah atas sebab perkara 4(1). Akan tetapi ianya bukan bagaimana perkara 4(1) beroperasi. Perkara 4(1) menyatakan bahawa PP sebagai undang-undang agung persekutuan dan apa-apa undang-undang yang digubal selepas hari merdeka yang tidak

A sah dengan PP, setakat mana bahagian yang tidak selaras, adalah terbatal (lihat perenggan 283 & 320)

(8) **(oleh Zabariah Mohd HMP, majoriti)** Perayu tidak menunjukkan bagaimana APJ atau penggunaan kuasa dibawahnya adalah sembarangan dan tidak boleh disokong. Tujuan dan polisi APJ adalah untuk menangani peningkatan yang merisaukan dalam indeks jenayah, terutamanya dalam jenayah terancang atau jenayah oleh kumpulan yang mengancam ketenteraman awam atau ekonomi negara. Perkara 149 memberikan parlimen kuasa perundangan untuk mengubal APJ dengan kesan untuk mengurangkan kebebasan asas yang dijamin dibawah perkara 5, 9, 10 dan 13 PP. Parlimen berada dalam kedudukan yang lebih baik untuk membuat keputusan berkaitan dengan polisi sosial dan bukannya mahkamah. Parlimen mewakili kehendak satu majoriti yang dilantik secara demokrasi dan oleh itu, keputusannya harus diterima sebagai sah. Mahkamah, sebaliknya, tidak berada dalam kedudukan untuk menentukan perihal polisi (lihat perenggan 296, 298 & 473)

(9) **(oleh Zabariah Mohd HMP, majoriti)** Kepuasan eksekutif atas pengataan fakta yang memadai yang menjadi asas di mana satu perintah tahanan adalah subjektif dan tidak terbukan kepada mahkamah untuk meneliti sama ada pengataan tersebut memadai. Pengataan fakta yang berurusan dengan hal dibawah bidang kuasa polisi negara berkaitan dengan keselamatan negara yang mana merupakan kepuasan subjektif eksekutif yang mana pengataan tersebut tidak boleh digantikan dengan satu ujian objektif di mahkamah (lihat perenggan 362)

(10) **(oleh Zabariah Mohd HMP, majoriti)** Doktrin bentuk asas PP tidak terpakai dalam menafsir keperlembagaan s 15B APJ. Konsep bentuk asas mungkin terpakai apabila undang-undang yang dicabar cuba untuk meminda PP, tetapi ianya bukan perkara tersebut di sini/tiada apa-apa yang dinyatakan dalam PP berkaitan peruntukan mana didalam PP membentuk bentuk asasnya. Untuk mencabar keperlembagaan s 15B, ianya perlu diuji dengan mana-mana peruntukan PP dan bukannya dengan konsep bentuk asas (lihat perenggan 417 & 470)

(11) **(oleh Zabariah Mohd HMP, majoriti)** Perayu Nivesh Nair a/l Mohan gagal untuk menunjukkan bahwa wujud ketidakpatuhan dengan keperluan prosedur, khususnya berkaitan dengan s 7B APJ. Pengataan positif yang dibuat oleh pengerusi Lembaga tersebut dalam afidavitnya berkaitan dengan pembentukan Lembaga tersebut tidak pernah dicabar atau dipatahkan oleh perayu tersebut (lihat perenggan 462 & 468)]

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Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012) ss 8B(1), 8C

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Appeal from: Criminal No BA-44-266–09 of 2018, BA-44-300–10/2018, BA-44-276–09 of 2018, BA-44-324–11 of 2018, BA-44-268–09 of 2018 and WA-44-239–09 of 2019 (High Court, Shah Alam)

Najib Zakaria (Noor Hisham Ismail and Isa bin Aziz with him) (Najib Zakaria, Hisham & Co) in Appeal Nos 05(HC)-303–12 of 2019(B), 05(HC)-304–12 of 2019(B), 05(HC)-305–12 of 2019(B), 05(HC)-307–12 of 2019(B) and 05(HC)-308–12 of 2019(B) for the appellants.
Gopal Sri Ram (Ravin Jay and Yasmeen Soh with him) (Hajjan Omar & Co) in Appeal No 05(HC)-7–01 of 2020(W) for the appellant.
Shamsul Bolhassan (Liew Horng Bin and Muhammad bin Sinti with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.
Gurdial Singh Nijar (Abraham Au and Shad Saleem Faruqi with him) as amicus curiae.

Nallini Pathmanathan FCJ (delivering dissenting judgment of the court):

INTRODUCTION

[1] Preventive detention describes the practice of incarcerating individuals without trial. They are imprisoned without their having been found guilty of a crime. They are so imprisoned on the basis of allegedly having committed, or suspected of having committed, crimes. There is a further assumption that if released, they would be likely to commit additional crimes, thereby posing a danger to society at large.

[2] Under the Federal Constitution ('the FC'), art 149 allows for Parliament to enact such legislation for the purposes of the security of the nation and society. Articles 5, 9, 10 and of the 13 FC are suspended in the interests of the security of the nation and society. However arts 4, 8, 121 and 151 of the FC are not excluded. Neither are they subordinated to art 149 of the FC.

[3] To that extent, preventive detention prioritises security over individual liberty. While such prioritisation may not in itself be objectionable, the fact

that such legislation effectively allows incarceration without the individual going through the due process of law, makes it of equal importance that individual liberties are not unjustifiably or undeservedly transgressed.

[4] The subject legislation under consideration in these appeals is the Prevention of Crime Act 2015 ('the POCA'), which was enacted pursuant to art 149 of the FC. Article 149, which is in Part XI of the FC, allows for legislation against subversion as well as action prejudicial to public order. The title to POCA describes it as legislation to provide for the more effectual prevention of crime throughout the nation, the control of criminals, members of secret societies, terrorists and other undesirable persons. The registrable categories include traffickers, smugglers of migrants, unlawful society or gang members and terrorists.

[5] Under POCA, an individual may be arrested, without warrant by a police offic er who has 'reason to believe' that grounds exist which would justify holding an inquiry against that individual. An individual may be detained at the behest of a police officer, who 'reasonably believes' that the individual has committed crimes, or suspects that he has committed crimes. After arrest, an Inquiry Officer conducts an inquiry within a specified number of days. The findings of the Inquiry Officer as well as his recommendation as to detention are then forwarded to the Prevention of Crime Board.

[6] The Minister then makes a decision whether to issue a detention order or otherwise. *The term of a detention order is two years and is renewable indefinitely. This means that preventive detention can be for an indefinite period, without the individual/s being charged and accorded an opportunity to the due process of being heard and lawfully punished or released.*

[7] Under art 151 of the FC, which provides constitutional safeguards for the detainee, no individual may be so preventively detained unless a Board of Inquiry constituted under s 7B of the POCA, hears the detainee's representations. In short, the detainee is afforded an opportunity to be heard.

[8] The Board finds no merit in the detainee's representations, or conversely, directs the release of the detainee, if satisfied that the representations are meritorious.

[9] If the Board finds that there is no merit in the detainee's representations, it makes consequential orders under POCA. These orders affect the liberty of the detainee as the orders that may be made include:

(a) detention for a period not exceeding two years; however the detention may be extended for a further two years at a time; or

(b) restricted residence for five years which may be extended for further five year periods with an electronic monitoring device attached.

[10] *Therefore, it is this decision of the Board of Inquiry that effectively determines whether the individual will be preventively detained or otherwise. And it is that same decision in respect of which no judicial scrutiny is permitted under* s 15B of the POCA. The net effect is that the decision to detain the individual is seemingly placed beyond the scrutiny of the courts.

[11] Section 15B of the POCA provides as follows:

> 15B(1) *There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act,* except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> (2) In this Act, *'judicial review' includes proceedings instituted by way of —*
>
> (a) *an application for any of the prerogative orders of mandamus, prohibition and certiorari*;
>
> (b) *an application for a declaration or an injunction*;
>
> (c) *a writ of habeas corpus*; and
>
> (d) *any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Board in accordance with this Act.* (Emphasis added.)

OUSTER CLAUSES

[12] Section 15B is an ouster clause. As explained by amicus curiae Professor Shad Saleem Faruqi, an ouster clause also known as a privative clause is a provision in a statute that seeks to prohibit judicial review of acts or decisions of the Executive or of a named authority. It seeks to remove the court's ability to scrutinise the legality of a determination made by statutory bodies, tribunals and in the instant case, the decision of the Board to detain an individual under POCA. Ouster clauses seek to strip the courts of their supervisory judicial function.

[13] The primary issue in this appeal is a consideration of the constitutionality of s 15B of the POCA in light of art 4 of the FC. This article ensures that all bodies stay within the limits of the FC, even in the face of ouster clauses prohibiting judicial review. Where a complaint of unconstitutionality is involved can an act of Parliament or a statutory provision crafted to exclude the scrutiny of the court prevail? It should be emphasised that this appeal deals only with the ability of the courts to scrutinise the decision of the Board. It does not

mean that if the ouster clause is found to be invalid the exercise of discretion or power by the Board is thereby automatically invalidated. That is a separate matter that is to be determined by way of judicial review or administrative law principles.

[14] What is in issue here is whether a statutory provision which seeks to preclude the courts from exercising their basic supervisory function of acting as a check and balance can be ousted, given the clear provisions of the FC.

THE SIX APPEALS

[15] These six appeals relate to six different habeas corpus applications. They are brought/lodged against the six decisions of the High Court in Kuala Lumpur delivered on a series of dates, dismissing the appellants' applications for a writ of habeas corpus to secure their release in relation to detention orders made against the appellants by the second and third respondents under s 19A of the POCA.

[16] The series of six appeals before us raise a fundamental albeit controversial question of law in relation to the *constitutionality of ouster clauses in legislation dealing specifically with preventive detention enacted pursuant to art 149 of the FC.*

[17] The six appellants who are detainees under POCA challenge the constitutionality of s 15B of the POCA, ie the ouster clause which stipulates that the courts are precluded from judicially reviewing and scrutinising the decision of the Prevention of Crime Board. It is this decision that affirmed or endorsed the decision of the Board to detain them under POCA, save on the grounds of procedural non-compliance.

[18] The appeals in question are:

Appeal No	Parties
05(HC)-304–12 of 2019(B)	Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & 4 Ors
05(HC)-308–12 of 2019(B)	Darweesh Bin Raja Sulaim v Lembaga Pencegahan Jenayah & 4 Ors
05(HC)-303–12 of 2019(B)	Ragu a/l Vitee v Lembaga Pencegahan Jenayah & 4 Ors
05(HC)-305–12 of 2019(B)	Velu a/l Rajakumar v Lembaga Pencegahan Jenayah & 4 Ors
05(HC)-307–12 of 2019(B)	Devandren a/l James v Lembaga Pencegahan Jenayah & 4 Ors

05(HC)-7–01 of 2020(W)	Nivesh Nair a/l Mohan v Dato' Abdul Razak Bin Musa, Pengerusi, Lembaga Pencegahan Jenayah

[19] It was determined that these appeals be heard together as they all deal with the same fundamental issue, namely the constitutionality of s 15B of the POCA.

[20] In the event the statutory ouster clause is found to be constitutionally valid, it follows that the provision will be strictly adhered to, such that only procedural non-compliance will comprise the subject matter of any habeas corpus application.

[21] If s 15B of the POCA is found to be constitutionally invalid and thereby null and void, it follows that the courts may then undertake a full judicial review of the decision of the Board. This does not mean that the detainees will necessarily be released. The courts will simply be at liberty to judicially review the decision of the Board to reject the representations of the detainee within circumscribed limits.

In short the decision of the Board to detain the detenu under POCA will be subject to judicial scrutiny, but again under circumscribed limits relating to the legality of the decision.

REPRESENTATION AT THE HEARING OF THESE APPEALS AND ASSISTANCE AFFORDED BY AMICUS CURIAE

[22] In determining these appeals we were assisted considerably by distinguished and renowned counsel Dato' Seri Gopal Sri Ram, who led the arguments on behalf of the appellants, and Najib Zakaria, whose proficiency in this area of the law is well-respected.

[23] We were equally fortunate to have experienced and knowledgeable senior federal counsel ('SFC') Shamsul Bolhassan, and the skilful and meticulous SFC, Liew Horng Bin from the Attorney General's Chambers, assisted by the diligent SFC Sinti bin Mohamed, to aid us with clear and cogent arguments on the necessity for such ouster clauses to be given effect, particularly in the field of preventive detention. I express my gratitude to them for their well-reasoned and researched submissions.

[24] As the issues in this series of appeals are of pivotal significance, because they will have a binding effect on the reviewability of such ouster clauses in future cases relating to POCA, we considered it necessary and prudent to enlist the assistance of amicus curiae to enable the court to ascertain and explore the full scope of the law in this area.

[25] We were privileged to receive the erudite treatise of the eminent constitutional expert, Emeritus Professor Shad Faruqi on this matter. In court, we heard the eloquent and expert counsel, Dato' Nijar as amicus curiae, present a full and detailed submission on the entire scope of the appeal, as well as answering the questions we raised. We express our gratitude to them for their enlightening and comprehensive submissions.

[26] As stated at the outset, the substance of the submissions turned on the constitutional validity of the ouster clauses in s 15B of the POCA. We turn immediately to the submissions put forward by the various parties. In view of the length of the parties' submissions, we provide a summary of the same.

THE APPELLANT'S SUBMISSIONS ON THE CONSTITUTIONALITY OF S 15B OF THE POCA

[27] In summary, the appellants contend that these statutory provisions, which purport to oust the jurisdiction of the court to review the decision to detain them under POCA is unconstitutional. They submit that such statutory provisions effectively restrict judicial powers as enshrined under art 121(1) FC, and are to that extent, void. In support of this submission reliance is placed on the now renowned trilogy of cases, namely *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya'), *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('Indira Gandhi') and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudo').

[28] More specifically, learned counsel Gopal Sri Ram submitted that s 15B of the POCA is unconstitutional as it infringes the provisions of art 121(1) of the FC in relation to judicial power and should therefore be struck down. This in turn is because it curtails the right to judicial review save on procedural grounds. The ouster clause infringes judicial power vested in the High Court to remedy, through judicial review, the detention of a detainee who seeks to challenge the lawfulness or legality of his detention. It also removes the constitutionally guaranteed right of a detainee under art 5 of the FC to challenge his detention on substantive grounds. In other words, a detainee ought to be able to challenge his detention on both procedural as well as substantive grounds.

[29] The ouster clause also impedes access to justice under art 5(1) of the FC, recognised as a fundamental right in *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12. This envisages the right to a just and effective remedy (see *Anita Khushwaha v Pushap Sudan* AIR 2016 SC 350, and *AIC Limited v Fischer* 2013 SCC 699).

[30] It was further submitted that s 15B of the POCA is unconstitutional because it violates the basic structure of the Constitution and the doctrine of separation of powers by impeaching judicial power as enshrined in art 121 of the FC. A

[31] Further to *Indira Gandhi*, s 15B of the POCA renders the detention order unlawful and void and liable to be set aside (see *Minerva Mills Ltd v Union of India* 1980 AIR 1789 for the proposition that judicial power may not be removed from the High Courts). B

[32] Moreover POCA was enacted pursuant to art 149 of the FC, which suspends the operation of arts 5, 9, 10 and 13 but not art 121 of the FC. Accordingly s 15B of the POCA is unconstitutional, the detention is illegal and improper and a writ of habeas corpus should ensue. C

[33] Najib Zakaria guided us in the course of his written submissions through the law on ouster clauses in Malaysia commencing with the earliest decision in this jurisdiction on the application of ouster clauses in emergency or preventive legislation in *Re Tan Boon Liat @ Allen & Anor et al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108; [1977] 1 MLRA 22. The Federal Court in that case dealt with ouster clause construction in preventive detention legislation in the form of s 6 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. D E F

[34] There it was provided that recommendations of the Advisory board were to be given to the Yang di Pertuan Agong who could then give the Minister such directions, if any as he thought fit. Such decision was final and 'shall not be called into question in any Court'. G

[35] In *Re Tan Boon Liat* there was a contravention of art 151(1)(b) of the FC in that the decision confirming the detention was made beyond the prescribed period of three months in the said article. The Advisory Board had exceeded the period, and accordingly the Yang di Pertuan Agong's decision was similarly out of time as prescribed under the FC. H

[36] Lord President Suffian held that the ouster clause applied only to real decisions and not to ultra vires decisions, relying on*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. As His Majesty's orders were ultra vires the detainee was ordered to be released. In other words, the ouster clause had no effect where the decision itself was flawed. I

[37] Chief Justice Lee Hun Hoe CJ (Borneo) emphasised that in matters as

fundamental as the liberty of the subject it was imperative that there should be strict compliance with the requirements of the Constitution, and notwithstanding the ouster clause, the breach of duty on the part of the Advisory Board rendered the continued detention after the prescribed three month period unlawful. Justice Ong Hock Sim FCJ reiterated a similar view.

[38] It was submitted that as far back as 1977 the Federal Court recognised that an ouster clause cannot effectively oust the jurisdiction of the court and thereby salvage an illegality premised on a constitutional contravention.

[39] Najib Zakaria then submitted on the position of ouster clauses in England as opposed to Malaysia. In England, ouster clauses are construed restrictively and only given effect where there are express words to that effect or the clearest of implications. However Malaysia is governed by constitutional supremacy while England subscribes to parliamentary supremacy. The FC is the supreme law of the land as borne out by the legendary case of *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112; [1976] 1 MLRA 410 where Suffian LP famously stated:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

[40] And in*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 ('Sivarasa Rasiah'), Gopal Sri Ram FCJ (as he then was) reaffirmed the doctrine of the supremacy of the Constitution which means that law that is not consonant with or transgresses the purview of the FC is liable to be struck down.

[41] To complete this argument it was submitted that POCA was enacted pursuant to art 149 of the FC which does not suspend the operation of art 121 of the FC. Accordingly judicial power is not ousted (even if that were permissible), as a consequence of which the ouster clause in POCA is ineffective as it cannot override art 121 of the FC.

[42] Najib Zakaria completed his submissions by reference to the renowned trilogy of cases elucidating the full and proper construction to be accorded to judicial power under art 121 of the FC. As this was a common aspect of all parties submissions, we detail those submissions more fully when setting out the position taken by amicus curiae, Dato' Nijar.

THE RESPONDENTS' SUBMISSIONS ON THE CONSTITUTIONAL VALIDITY OF S 15B OF THE POCA

[43] SFC Shamsul Bolhassan responded to the appellants' submissions also by reference to the renowned trilogy of cases, namely *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*. He accepted that judicial power is vested in the High Court and that Parliament cannot amend those constitutional provisions that comprise a part of the basic structure of the FC.

[44] However he pointed out that in the context of the six appeals here relating to POCA, there was an entirely different legislative regime in place. POCA was one of a series of special laws relating to preventive detention enacted pursuant to art 149 of the FC. This was to be contrasted with the legislation in the trilogy of cases all of which dealt with general laws enacted pursuant to art 74.

[45] He stated that there should be a general differentiation between these two regimes. Legislation enacted pursuant to art 149 was special and operated under a different mechanism. To substantiate this point he relied on the preamble to POCA (as reproduced earlier), which dealt specifically with subversion and the prevention of serious crimes and violence to ensure public order.

[46] He further pointed out that protection against transgressions in the conduct and operation of preventive detention legislation was provided for within the FC itself in the form of art 151 of the FC. Article 151 in itself affords the detainee an opportunity to be heard and his representations as well as the basis for the issuance of a detention order are scrutinised and analysed by an independent Advisory Board/Board of Inquiry. This, SFC maintained, was more than sufficient to provide a full 'remedy' to the detainee.

[47] In essence art 149 of the FC, it was argued, comprises a separate 'regime' within the FC that is necessitated for security reasons. This is borne out by the suspension of arts 5, 9, 10 and 13 of the FC. The need to safeguard security concerns for the country override the need for a full judicial scrutiny of the Board's decision. It was also stated that the jurisdiction of the court is not ousted in its entirety in that non-compliance with procedural safeguards comprise sufficient basis for the grant of a writ of habeas corpus.

[48] The respondents, through SFC Mohammed Sinti, in their written submissions, also rely on a long series of cases determined by this court, and more recently reinforced both by further statutory amendments (see Amendment Acts — the Malaysia Act (Act 26/1963), in force from 16 September 1963) and the Constitution (Amendment) Act 1988 (A704), in

force from 10 June 1988, referred to as 'the 1988 amendment') and judicial case law, particularly *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81; [2003] 2 MLRA 399 ('Nasharuddin') and *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] MLJU 667; [2005] 3 CLJ 914 ('Lee Kew Sang'), which uphold the position that such ouster of the court's jurisdiction to review is constitutional given that such legislation is enacted under art 149 of the FC.

[49] SFC Liew Horng Bin took us through the historical and philosophical context of the FC with a view to establishing that the courts do not enjoy an unlimited jurisdiction and unbridled powers when it comes to the enforcement of fundamental rights by way of judicial review. The submission put forward is that the remedy for the enforcement of such rights is governed by 'ordinary law' on a reading of the historical aspects of the Reid Commission. As this series of contentions relates primarily to the Report of the Reid Commission and the circumstances in which our FC took its current shape, these submissions are considered below in our analysis on judicial power and art 4(1) of the FC.

SUBMISSIONS BY THE AMICUS CURIAE PROFESSOR GURDIAL SINGH NIJAR

[50] In summary, Dato' Nijar highlighted that judicial review is a constitutional imperative operationalising the rule of law and separation of powers underpinning the FC. Judicial review was a crucial mechanism to act as an effective check and balance on the legislative and executive arms of government. Therefore any act by the legislature undermining judicial review would be tantamount to altering the basic structure of the FC and is void. Any attempt by the legislature seeking to insulate executive or administrative action from review should be struck down as unconstitutional no matter how widely worded (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135). Habeas corpus is another form of judicial review as they are both grounded on common principles. He concluded that s 15B of the POCA is unconstitutional and void for these reasons.

OPINION BY AMICUS CURIAE PROFESSOR SHAD SALEEM FARUQI

[51] Professor Shad Saleem Faruqi's extensively researched opinion explained the concept of ouster clauses and how they work. He explained the distinction between the position in the UK which is based on parliamentary sovereignty unlike Malaysia which is premised on constitutional supremacy. He pointed out that the latter allows any act of parliament including an ouster clause to be declared unconstitutional.

[52] With respect to ouster clauses in relation to legislation enacted pursuant to art 149 Professor Shad pointed out that notwithstanding the suspension of art 5 rights, the provisions of arts 8 and 121 remained intact and had to be complied with.

[53] He distinguished earlier case law in this jurisdiction which upheld ouster clauses on the grounds, notwithstanding arts 4(1), 121, 128 and 162(6) of the FC, which were not considered at all. He explained this could be attributed to the fact that (unlike other Commonwealth jurisdictions like India and Singapore) we were still influenced by colonial British case law, premised on the English concept of parliamentary sovereignty.

[54] He emphasised that as all judges take an oath to preserve, protect and defend the constitution under the Sixth Schedule of the FC, an ordinary piece of legislation or a constitutional amendment cannot neutralise the duty of the courts. He further stated that the courts have the constitutional mandate to uphold the FC and strike down any legislative or executive measure that is unconstitutional. His conclusion is that s 15B of the POCA is therefore unconstitutional and void as it seeks to remove the jurisdiction of the courts to scrutinise legislation with a view to ascertaining whether such provision is consistent with the FC.

[55] It must be said that the summaries above do little justice to the comprehensive and learned opinions of amicus curiae, which ought to be read in original to appreciate the full context and extent of their treatises.

ANALYSIS AND DECISION

[56] In light of the foregoing, I now turn to analyse and determine the issue before us, namely the constitutional validity of s 15B of the POCA.

The role of art 4(1) of the FC

[57] As stated at the outset the significant issue that arose for consideration by the parties and amicus curiae was *whether in light of art 4(1) of the FC, which enables the Judiciary to strike out statutes or statutory provisions which are not consistent with the FC, the ouster clause namely s 15B in POCA, is constitutional, given that it expressly precludes judicial review or scrutiny of the decision of the Board pursuant to POCA?*

[58] Put another way, *if art 4(1) of the FC allows any statute or statutory provision to be subject to judicial scrutiny for the purposes of ascertaining whether its provisions or objective are consistent with the FC, can Parliament enact a law*

effectively preventing the courts from undertaking the judicial scrutiny expressly conferred on the Judiciary by art 4(1)?

[59] Section 15B of the POCA expressly precludes the courts from exercising any form of review function over decisions made by the Board on the grounds that it was legislated pursuant to art 149 of the FC for security reasons, save on procedural grounds.

[60] Article 149 of the FC allows for the promulgation of special legislation to deal with subversion and the other events specified there, for the ultimate protection and benefit of the nation. For the purposes of such special legislation, certain fundamental liberties such as arts 5, 9, 10 and 13 of the FC are suspended. This means that legislation enacted pursuant to art 149 of the FC may infringe personal liberties as set out in the foregoing articles, but still remain constitutional.

[61] What then is the position if a challenge is brought in respect of the constitutionality of either of these provisions, namely s 15B of the POCA? This provision explicitly provides that no such challenge can be brought. Does it therefore follow that no such challenge can be brought against these provisions because Parliament has expressly provided so? Or because these provisions were enacted pursuant to art 149 of the FC?

[62] In answering these questions it is imperative to bear in mind that we practice constitutional supremacy where the Federal Constitution is the supreme law of the land. *Therefore legislation, albeit preventive detention, legislation must conform to, or fall within the ambit of the FC. If there is a contravention of any of the provisions of the FC, the legislation or statutory provision within such legislation is void, as set out in art 4(1) of the FC.*

[63] It follows that any such legislation or statutory provision that is challenged on the grounds of constitutionality as provided for under art 4(1) of the FC must be tested against the provisions of the rest of the FC to answer the issue of constitutional validity. The answer as to whether there has been an infringement of any provision of the FC will turn on a construction of the statute as against the FC.

[64] Article 4(1) FC provides:

> This Constitution is the supreme law of the Federation and *any law passed after Merdeka day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.* (Emphasis added.)

[65] The article therefore provides for:

(a) constitutional supremacy as opposed to parliamentary sovereignty; and significantly for the purposes of these appeals; and

(b) the right to challenge the constitutionality of any 'law' to ascertain whether it is consistent or inconsistent with the FC. If the legislation falls within the former category, it is constitutional, but if it is inconsistent with the provisions of the FC, it is unconstitutional.

[66] In other words, art 4(1) of the FC enshrines the ability of the Judiciary to entertain a challenge in respect of any legislation or statutory provision enacted by Parliament. Whether the challenge is successful or otherwise is a different matter. It must be the Judiciary that is armed to ascertain constitutionality as such a function does not fall within the purview of the other two arms of government.

[67] It follows from this that any or all legislation (and therefore statutory provisions in legislation) enacted by Parliament can be made the subject matter of challenge under art 4(1) of the FC. This is clear from the second part of art 4(1) of the FC which provides that law that is inconsistent with the FC is void.

[68] It is not possible to ascertain whether a law is consistent or inconsistent with the FC, until and unless a challenge is made as to its constitutionality on the basis of art 4(1) of the FC. So to enact a law which precludes the application of art 4(1) of the FC, would defeat the very objective and purpose of that article. Article 4(1) of the FC would be rendered otiose. In other words there must be a means of challenging the 'law' in question, failing which the purpose and effect of art 4(1) of the FC would be nugatory.

[69] As stated earlier, any such challenge would necessarily have to be determined by the courts, the third arm of government. The Judiciary's role in ensuring that there is a check and balance on both Legislative and Executive action (namely the rule of law) is enshrined in art 4(1) of the FC.

[70] To that extent art 4(1) of the FC enshrines the twin fundamental pillars of a constitutional democracy, namely the rule of law and the doctrine of the separation of powers. It is the root or source for the conferment of judicial power as exemplified in art 121 of the FC. It reflects the scope and ambit of judicial power, as it expressly recognises that it is the Judiciary that exercises the power to provide a check and balance for the acts and omissions of the other two arms of government, namely the Legislature and the Executive.

[71] The point being made here is that the right to challenge legislation is an integral part of the FC. Any statutory provision which seeks to preclude the

courts from exercising their rights under art 4(1) of the FC contravenes that very article and to that extent contravenes the substance of the FC and is void. Section 15B of the POCA is an ouster clause that seeks to do precisely that, namely preclude or oust the jurisdiction of the courts to examine decisions made in relation to preventive detention by an Inquiry Board. It stipulates that no court can exercise its powers of judicial review to do so.

[72] That, in itself, is a contravention of art 4(1) of the FC which enables all statutory provisions to be examined for constitutional validity. In order to examine its constitutional validity, It follows that s 15B of the POCA, being a component part of legislation enacted by Parliament, *is* subject to challenge under art 4(1) of the FC.

[73] Put another way, art 4(1) of the FC prevails over these ouster' provisions, *in so far as the right to challenge such provisions is concerned.* The net effect of art 4(1) of the FC is that any attempt to preclude a challenge as to the constitutionality of legislation, is ineffective. Ouster clauses are ineffectual in so far as they seek to preclude the examination of legislation in relation to its constitutionality.

Article 149 of the FC

[74] The fact that this legislation was promulgated pursuant to art 149 of the FC does not make either the legislation itself, or statutory provisions within it, immune from such challenge or examination under art 4(1) of the FC. There is nothing in art 149 of the FC that protects legislation enacted under it from constitutional challenge under art 4(1) of the FC. If it were not so, it would be possible for Parliament to enact extreme legislation without any recourse to examine or review such legislation to ascertain whether it complies with the FC, the supreme law of the land, where constitutional supremacy reigns.

[75] As such, it may be said that it is implicit in art 149 of the FC itself, that there can be no ouster of judicial power as art 4(1) of the FC is not excluded. Instead it provides that infringements of arts 5, 9, 10 and 13 of the FC do not render legislation made pursuant to it, unconstitutional.

[76] Reverting to the power of the courts to ascertain the constitutional validity of a statutory provision or legislation, it remains essential that law enacted by Parliament remain open to judicial scrutiny for that purpose.

Judicial supremacy?

[77] It should further be pointed out that the existence of art 4(1) of the FC in no way confers a system of judicial supremacy either. The fact that the courts

are tasked with ascertaining the constitutionality of legislation passed by the Legislature and executed by the Executive, conforms to the most basic precepts of the separation of powers and thereby the rule of law. Therefore any attempts to suggest that the Judiciary is usurping the powers of the Legislature and thereby the franchise of the people is misplaced, because the Judiciary functions only to point out and prevent acts that are inconsistent with the FC. It is therefore the FC that is supreme, and the Judiciary merely the means of ensuring that the provisions of the FC are protected.

[78] At all times the Judiciary is, or ought to be aware of its role as performing such a check and balance and encroach no further. What this means in real terms is that the courts do not and should not encroach on matters of security, policy et cetera, which are not within the ambit of its scope of function. The Judiciary is very much alive to this boundary, as that comprises an essential component of the doctrine of the separation of powers.

[79] As stated by amicus curiae Professor Shad Saleem Faruqi in his advice to the court, 'there are overriding constitutional considerations for ensuring that everyone stays within the limits of the Constitution, even if there are privative clauses obstructing the path to judicial review. It is submitted that if any complaint of unconstitutionality is involved, no legislative formula inserted into an Act of Parliament can prevent the courts from exercising their function of scrutinising the impugned law or action and enforcing the commands of the supreme law'.

[80] Dato' Nijar in turn submitted that the ouster clause is unconstitutional particularly in light of the recent Federal Court decisions in *Sivarasa Rasiah*, *Semenyih Jaya* and *Indira Gandhi*. He highlighted that these cases identified '... judicial review as a constitutional imperative, operationalising the rule of law underpinning the Constitution and its concomitant, the separation of powers. These concepts taken together were declared as the basic structure of the Constitution — sacrosanct and inviolate and not amenable to the amendment provisions of the Constitution'.

[81] Indeed in *Semenyih Jaya*, this court speaking through Zainun Ali FCJ referred to the leading case on basic structure:

> [87] The principles laid down in *Kesavananda Bharati v State of Kerala AIR* 1973 SC 146 *were reviewed and affirmed by the Supreme Court in Indira Nehru Gandhi v Shri Raj Narain & Anor* AIR 1975 SC 2299. The Supreme Court emphasised the sanctity of the doctrine of separation of powers and the exclusivity of judicial power Khanne J, in concurring with the majority, inter alia, held at pp 2340–2347 that:
>
> > A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of

> judicial function and legislation function have been demarcated *and it is not permissible for the legislature to encroach upon the judicial sphere.* It has accordingly been held that a legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the legislature to declare the judgment of the court to be void or not binding. (Emphasis in original).

[82] An ouster clause such as s 15B of the POCA does encroach upon judicial power expressly and directly, as it proscribes judicial scrutiny for inconsistency with the FC. As such it does injury to the doctrine of the separation of powers and thereby the rule of law.

[83] And in *Indira Gandhi* the primal importance of art 4 of the FC was explained by this court by reference to the well-known decision of the erudite former Chief Justice of Singapore, Chan Sek Keong in *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947; [2012] SGHC 163 at paras 14–15:

> ... The first fundamental difference is that the UK's Westminster model is based on the supremacy of the UK Parliament, under which the UK parliament is supreme, with the result that the UK have no power to declare an Act of the UK parliament unconstitutional and, hence, null and void. In contrast, Singapore's Westminster model is based on the supremacy of the Singapore Constitution, with the result that the Singapore courts may declare an Act of the Singapore parliament invalid for inconsistency with the Singapore Constitution and, hence, null and void. Article 4 of the Singapore Constitution expresses this constitutional principle in the following manner:
>
> This Constitution is the supreme law of the Republic of Singapore and any law enacted by the legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, by void.
>
> It should be noted that art 4 of the Singapore Constitution states that any law inconsistent with this Constitution, as opposed to any law inconsistent with any provision of this Constitution is void. *The specific form of words used in art 4 reinforces the principle that the Singapore parliament may not enact a law, and the Singapore government may not do any act, which is inconsistent with the principle of separation of powers to the extent to which that principle is embodied in the Singapore Constitution.* (Emphasis added.)

[84] Indeed if the position were taken that ouster clauses render legislation such as s 15B of the POCA immune from examination under art 4(1) of the FC, that would afford the Legislature and the Executive immense and arbitrary powers with no redress or respite to persons affected and/or aggrieved by the implementation of such legislation or the exercise of discretion within such legislation, illegally or without valid basis. That would run counter to the *rule of law* that comprises a basic and fundamental tenet of our Westminster model of democracy and comprises the lifeblood of the FC. In these circumstances I

can only respectfully concur with learned amicus curiae.

[85] Applying the doctrine of stare decisis I am of the view that this court is bound to abide by the principle establishing that art 4(1) of the FC (as expounded in both *Semenyih Jaya* and *Indira Gandhi*) is sacrosanct and places an express duty on the courts of this land to subject any statute or executive action or omission arising therefrom to scrutiny, when challenged, to ensure that it complies with the FC. To do any less would amount to an omission to adhere to a judge's oath to protec t the FC.

[86] However the attorney general ('AG') put forward submissions opposing this particular construction of the remedies available in relation to preventive detention legislation made pursuant to art 149 of the FC. The thrust of these submissions as alluded to earlier, turned on a historical perspective and construction of the Reid Commission's formulations leading up to the FC, which historical provisions, it was contended, at all times accepted that all remedies available in relation to preventive detention legislation such as POCA was proscribed and limited by federal law.

The submissions of the AG in maintaining that s 5B of the POCA is constitutional

[87] SFC Liew Horng Bin began his comprehensive submissions on behalf of the attorney general on this aspect by accepting and outlining the position in law as enunciated in the trilogy of cases, namely *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*:

(a) judicial power is enshrined in the High Courts under art 121 of the FC. The rule of law and the separation of powers denoting the independence of the Judiciary are fundamental features of the basic structure of the FC. The inherent judicial power of the civil courts under art 121 of the FC is 'inextricably intertwined' with their constitutional role to provide a check and balance mechanism as envisaged by the FC;

(b) Parliament does not have the power to amend the FC to the extent of undermining its fundamental or basic features such as the doctrine of separation of powers and the independence of the Judiciary. These core features, which comprise the quintessence of the cannot be abrogated or removed by way of constitutional amendment (see *Indira Gandhi* at para 39);

(c) the courts can ensure that Parliament does not destroy the basic structure of the FC. While the FC does not expressly refer to the doctrine of a basic structure, what it means is that a statute is open to judicial scrutiny for violation of the provisions of the FC, both express and the underlying principles that constitute the founding principles of the FC (see *Alma Nudo* at para 73);

(d) judicial power cannot be removed from the Judiciary and equally cannot be conferred on other bodies in the absence of the constitutional safeguards afforded to an independent Judiciary; non-judicial power cannot be conferred by another arm of government onto the Judiciary (see *Semenyih Jaya* at paras 54, 86 and 105; and *JRI Resources* at para 17);

(e) the power of Parliament to make laws with respect to matters as enumerated from the Federal or Concurrent Lists of the FC does not mean that Parliament and enact law which is contrary to the entrenched doctrine of the separation of powers or judicial power under art 121 of the FC (see *JRI Resources* at para 19); and

(f) the FC is interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles comprising the structure of the FC (see *Indira Gandhi* at paras 29–30).

The historical background to the FC — The Reid Commission Report

[88] The learned SFC submitted that in order to comprehend the meaning and content of the *rule of law* in the Federal Constitution, it is of relevance to study the history and background of art 4(1) of the FC. That takes us back to the original draft of the FC, which was annexed to the Reid Commission's Report 1957 as the 'Draft Constitution' ('Reid Draft Constitution'). The original provisions were modified and shortened, bringing about the present art 4(1) of the FC.

[89] In relation to judicial power it was reiterated, on behalf of the AG, that Parliament *could* limit the remedy issued by the courts in the form of judicial review or habeas corpus, by confining any challenge as to constitutionality of a statutory provision, to procedural compliance of an impugned decision.

[90] As the learned SFC put it, the issue was whether it comprises a basic structure of the FC that an aggrieved person is entitled to the fullest form of remedy in challenging a public authority's decision. This in turn called into question whether it was a basic structure of the FC that the Judiciary enjoys unlimited jurisdiction and unbridled powers when it comes to enforcement of rights by way of judicial review.

[91] In the original Reid Draft Constitution, draft art 3 reflected the import of the rule of law, and the marginal note reflected this. It comprised a part of Part II of the Reid Draft Constitution relating to fundamental liberties. The original draft art 3 provided for the supremacy of the Constitution over any law or executive acts. It read as follows:

3 The Rule of Law

(1) This Constitution shall be the supreme law of the Federation, and any provision of the Constitution of any State or of any law which is repugnant to any provision of this Constitution shall, to the extent of the repugnancy, be void.

(2) Where any public authority within the Federation or within any State performs any executive act which is inconsistent with any provision of this Constitution or of any law, such act shall be void.

[92] The original art 4 in the Reid Draft Constitution reads;

4 Enforcement of the Rule of Law

(1) Without prejudice to any other remedy provided by law —

(a) Where any person alleges that any provision of any written law is void he may apply to the Supreme Court for an order so declaring and, if the Supreme Court is satisfied that the provision is void, the Supreme Court may issue an order so declaring and, in the case of a provision of a written law which is not severable from other provisions of such written law, issue an order declaring that such other provisions are void.

(b) Where any person affected by any act or decision of a public authority alleges that it is void because —

(i) the provision of the law under which the public authority acted or purported to act was void, or

(ii) the act or decision itself was void, or

(iii) where the public authority was exercising a judicial or quasi-judicial function that the public authority was acting without jurisdiction or in excess thereof or that the procedure by which the act or decision was done or taken was contrary to the principles of natural justice,

he may apply to the Supreme Court and if the Court is satisfied that the allegation is correct, the Court may issue such order as it may consider appropriate in the circumstances of the case; ...

[93] Therefore it was originally envisaged that there be provision for the rule of law and enforcement of the same, as set out in the original art 3 and art 4 of the Reid Draft Constitution.

[94] These articles were amended and the original art 4 removed because it was concluded that 'it is impracticable to provide within the limits of the Constitution for all possible contingencies. It is considered that sufficient remedies can be best provided by the ordinary law'.

[95] In essence it was contended on behalf of the attorney general that the amendment to the original art 4 as above, effectively circumscribed the powers of the court such that remedies available to be issued by the court were confined to that prescribed by laws enacted by Parliament (see *Government White Paper 'Constitutional Proposals for the Federation of Malaya'*.)

[96] It appears to me that it is not tenable to extract such a drastic construction from the removal of the original art 4. The removal of that original draft art 4 does not mean that the right to a remedy for a transgression of the rule of law albeit in terms of a contravention of fundamental rights as provided in Part II or elsewhere was taken away and given to Parliament instead. To my mind, that would result in a perverse reading and construction of the progressive evolution of the FC.

[97] The preferable construction to be adopted is simply this: It was, at the time, untenable and impractical to set out in the FC itself, the various remedies for transgressions by the other arms of government and public bodies and the manner of procurement of such remedies. It was therefore determined as a matter of practicality that the adjectival mode by which such remedies could be procured would be determined and set out by federal law. That does not and cannot reasonably be construed to mean that contrary to the rule of law, judicial powers or the remedies available for a transgression of fundamental rights were confined to legislation to be crafted entirely by Parliament.

[98] More importantly perhaps it is important to emphasise that there is a difference between the concept of judicial review and the remedies available in respect of judicial review. *Semenyih Jaya* and *Indira Gandhi* comprise authority for the proposition that judicial review is a concept that forms a part of the basic structure of the FC.

[99] However remedies are separate and are found largely in ordinary law, such as Schedule of the Courts of Judicature Act. The Legislature has the right to truncate remedies. But the fundamental concept of judicial review or judicial scrutiny as enshrined in art 4 of the FC cannot be removed, abrogated or truncated.

[100] This would amount to thwarting access to justice at the threshold stage.

Reading the Draft Reid Commission Report to restrict judicial powers — AG's submissions

[101] SFC Liew however premised his submission for a restrictive construction of the remedies available on the basis of the historical records during the drafting stage of the FC. He submitted that insofar as judicial power is concerned: A

(a) the historical records of meetings show that the Judiciary was to be completely independent of both the Executive and the Legislature and that the Supreme Court should be vested with powers to decide whether or not the actions of both executive and Legislature are in accordance with the Constitution; B

(b) the initial draft on the 'Judiciary' outlined the powers and jurisdiction of the Supreme Court in item 60 while 61 and 62 set out the composition powers and jurisdiction of the High Court; C

(c) at the 53rd Commission Meeting it was agreed that there should be a supreme court and instead of having a separate provision for the setting up of the High Court and its powers and jurisdiction, that would be left for Parliament to decide whether or not to create a High Court. The power and jurisdiction of the Supreme Court should continue as it was then. That meant, according to the Reid Commission Report that the jurisdiction of the courts was 'within the legislative powers of the Federation and subject to the express terms of the Federation Agreement which provided for a Supreme Court consisting of a High Court and a Court of Appeal, and where the powers were determined by federal law. That was reflected in arts 114(4), 118, 119(2), 122, 123, 124(1) and (2) of the Draft Constitution; D E F

(d) substantially the same clauses were translated into the Constitutional Proposals for the Federation of Malaya. For the first time, art 121 made mention of the vesting of the judicial power of the Federation as being reposed in 'a Supreme Court and such inferior courts as may be provided by federal law'; G

(e) art 121 was officially adopted in the Constitution of the Federation of Malaya;

(f) following the formation of Malaysia, the Malaysia Act amended art 121 of the 1957 FC to establish High Courts such that each of the High Courts should have unlimited original jurisdiction and such appellate and revisional jurisdiction as may be provided by the Federal Law; H

(g) it was submitted that based on the historical context of judicial power, it was the intention of the Reid Commission that the jurisdiction, powers and procedures of the Supreme Court should continue in independent Malaya post-Merdeka. Further it was submitted that the 'basic structure' inherent vis a vis the Judiciary was that jurisdiction and powers conferred unto a court were matters purely within the legislative powers I

of the Federation. With the exception of the Supreme Court, whose jurisdiction was expressly conferred by the principal instrument the jurisdiction and powers of the courts were to be determined federal law. Reference was made to cll 14(1) and (3) and 15 of the Malayan Union Order in Council 1946;

(h) the conferral of the courts' jurisdiction and powers by federal law is entrenched in our constitutional history such that it was accepted by the Reid Commission. This was not, it is contended contrary to the separation of powers doctrine;

(i) the Commission at their meeting on 10 October 1956 recognised the principle of 'non-usticiability' and expressed their view that matters which were not enforceable in court should not be included. Preventive detention and Emergency provisions were to be treated narrowly. Major changes were introduced in the second draft and the combined effect of those changes was that remedies for enforcement of rights were to be proscribed by federal law and those remedies may be tightened or cutback in special circumstances;

(j) however the redrafted art 2 was criticised and ultimately the Commission removed the entire art 2 and explained that on the issue of the enforcement of the rule of law, the article was unsatisfactory and was omitted on the ground that it was impracticable to provide within the limits of the Constitution for all possible contingencies. Accordingly it was held that sufficient remedies were best provided by ordinary law;

(k) it was submitted for the AG that the net effect of omitting the draft art 2 on the enforcement of rights is that there is no absolute right to a full remedy. The type of remedy available, it is submitted is for the Legislature to decide. This follows from the decision to defer the issue of enforcement of a remedy of an aggrieved party to ordinary law;

(l) it was then concluded by way of submission that such ouster clauses are not per se constitutionally invalid, since what is sought to be ousted is the availability of a remedy for the enforcement of rights and not the exercise of judicial power. Limiting the scope and extent of availability of remedies for the enforcement of rights by federal law does not impinge on judicial power;

(m) therefore based on the drafting history of the FC, it was submitted that following *Semenyih Jaya*, while the doctrines of the separation of powers, independence of the Judiciary, rule of law, parliamentary democracy and constitutional monarchy form a part of the basic structure of the 1957 Constitution, the conferral of the courts' jurisdiction and powers by federal law is also a cornerstone of the FC; and

(n) there is no departure from *Semenyih Jaya*. Rather it is the scope of

enforcement of fundamental rights which is in issue here and following the Reid Commission drafting history, such remedies should be prescribed by 'ordinary law', in this case s 15B of the POCA.

[102] Having considered the submissions on behalf of the AG, I am of the view that:

(a) as stated above, it is important that the distinction between the concept of constitutional review is not confused with the remedies available for judicial review. The principle or doctrine of judicial review is an essential element in the milieu of the FC. It is an inextricable component of art 4(1) because the Judiciary cannot fulfil its function under that article unless judicial review is employed. So equating the doctrine with the remedy, is with respect, misconceived;

(b) the utilisation and reliance on the historical aspects of the Reid Commission's meetings and formulations, must, with the greatest respect, be treated with the appropriate circumspection. While all historical records and the chronology of the various versions of the draft Constitution reflect the stages of thought and intention of the crafters, such evolution cannot displace or override the clear provisions of the FC as they stand today. Nor can it be said conclusively that a consideration of these records points with finality to the construction that the AG seeks to place on judicial power and the extent of remedies available under the FC;

(c) the FC as it stands today must be read in accordance with its provisions as objectively construed in the context of the nation as a constitutional monarchy premised on parliamentary democracy. It must be construed in a holistic manner. In doing so, it is apparent that, as Professor Shad Saleem Faruqi frames it, the aim of our legal order was a democratic government under a fair and just system of laws. Parliament is not supreme;

(d) as the FC now stands, it does not envisage a law that is unjust, arbitrary, unreasonable, oppressive or disproportionate (see *Alma Nudo*). Accordingly the courts and judicial power subsist to ensure that in accordance with the guarantee of the FC, both the substantive and procedural content of our laws should ensure that there is no transgression of the limits of the FC. Article 149, while authorising the suspension of fundamental rights in arts 5, 9, 10 and 13, must still comply with arts 4, 8, 121 and 151. The historical background of the Reid Commission reports did not derogate from these principles. On the contrary they expressly provided for the same but determined subsequently that as a single document could not encompass the numerous and various reliefs required for transgressions of the FC, this was best left to be provided for in ordinary law. This did not however in

any way detract from the doctrine of the separation of powers and rule of law which require the Judiciary to act as a check and balance against the other two arms of government. To that extent judicial power and accordingly remedies issued by the Judiciary cannot be denuded, limited or restricted by ordinary or federal law;

(e) following the submissions of the AG, it would appear that as remedies for the enforcement of the transgression of fundamental rights would be left to ordinary law, federal law therefore somehow circumscribed the Judiciary's ability to frame remedies;

(f) the necessary corollary of such a submission would be that Parliament that enacts federal law would be at liberty to frame the requisite remedies available and circumscribe those remedies as it sought fit, notwithstanding arts 121 and 4. This would render both arts 121 and 4 nugatory and more importantly would effectively restrict the ability of a court to provide remedies to only that prescribed by Parliament;

(g) that in turn would effectively mean that parliamentary sovereignty prevails, rather than constitutional supremacy because judicial powers would be curtailed by legislation enacted by the Legislature. In the instant case, what is in issue is the jurisdiction of the courts to examine the decision of the Inquiry Board and thereby the Minister under s 15B of the POCA. If the AG's submissions are taken to their logical conclusion, it would follow that as the courts' powers to issue remedies is confined to federal law, it would not be able to scrutinise or afford any remedy to detainees under POCA, because the right to provide any such remedy is curtailed by s 15B of the POCA. As the courts' powers and jur isdiction is restricted to federal law, then it necessarily follows that the court's remedies must be restricted to procedural deficiencies as envisaged under s 15B;

(h) that would, with the greatest respect, run awry of the substantive effect of both arts 4 and 121 of the FC, as has been explained exhaustively above;

(i) the construction placed on the historical chronology of events leading up to the FC by the AG is somewhat strained, in an effort to support the proposition that remedies available under specific legislation, particularly legislation enacted under art 149 of the FC, are circumscribed by federal law. As pointed out earlier the amendments to the Reid Commission's report particularly in relation the removal of art 4 of the FC does not lend itself to the conclusion that remedies for transgressions of the FC would be determined and limited by federal law;

(j) any such construction would inevitably and logically amount to an incursion into judicial powers, contrary to the submission of the learned SFC. It is artificial to contend on one hand that judicial power remains untrammelled by espousing *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*, while maintaining that remedies available for the courts to issue on a transgression of constitutionally protected rights are circumscribed by federal law, ie Parliament; and

(k) on the contrary, it does infringe the doctrines of the separation of powers, constitutional supremacy and ultimately the rule of law. It would amount to mere lip service to the trilogy of cases to state that there is adherence to the same, while at the same time effectively stating that the powers of the courts are circumscribed by federal law.

[103] For these reasons, I am, with respect, unable to accede to, or accept the submissions of the learned SFC on this issue. However these submissions bring to the fore yet again, despite the trilogy of cases, the ambit and extent of judicial power under the FC, particularly in light of the 1988 amendment, which many read to amount to an abrogation of judicial power.

JUDICIAL POWER IN THE FEDERAL CONSTITUTION UNDER ARTS 121 AND 4(1) OF THE FC

[104] *Semenyih Jaya* and *Indira Gandhi*, as discussed above categorically stipulate that the 1988 amendment did NOT have the effect of eroding or removing judicial power. However prior to *Semenyih Jaya*, this court in its majority judgment in*Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 ('Kok Wah Kuan') took the position that judicial power had indeed been eroded and was circumscribed to, and by, federal law. This conclusion was reached on a literal reading of the express provisions of art 121(1) of the FC.

[105] The strong dissenting judgment of Richard Malanjum FCJ (later CJ) is renowned. It pointed out that the inherent power of the superior courts, being inherent powers, could not be eradicated or made subordinate to Parliament such as to render the Judiciary a mere agent of Parliament. This would naturally run awry of the doctrine of the separation of powers and the rule of law.

[106] The trilogy of cases, namely *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo* legally analysed and explained why a construction of the 1988 amendment leading to an erosion of judicial power was wholly untenable. These cases present the current and trite position, namely that judicial power is as it always was, and is certainly not circumscribed in the exercise of its powers by federal law.

[107] In these cases, the focal point of concentration in the course of the legal

A analysis was art 121(1) of the FC. Having set out the scope and ambit of art 4(1) of the FC above, it is my considered view that in construing *judicial power* as it subsists in the FC, the starting point should be art 4(1) of the FC.

B **[108]** The legal rationale for this lies in the scope and ambit of art 4(1) of the FC. It is in Part I of the FC and described as the law of the Federation. In its singular form it stipulates that the FC is the supreme law, thereby defining and indubitably guaranteeing constitutional supremacy as the law of the land. The shoulder note further validates constitutional supremacy, by stipulating once again that the FC is the supreme law.

C

[109] However that is not all. To give effect to constitutional supremacy, art 4(1) of the FC allows the striking down of any law that is inconsistent with the FC. These words hold within them, and encompass, both the rule of law
D and the doctrine of the separation of powers.

[110] Any discursive and rational construction of the scope and ambit of judicial power as expressed in art 121 of the FC must therefore commence with art 4(1) of the FC, as the basis for construing the scope and ambit of judicial
E power. From art 4(1) of the FC it is clear that judicial power extends to striking down federal law that is inconsistent with the FC.

Articles 121 and 4 of the FC — Harmonious construction

F **[111]** Article 121(1) of the FC must therefore be construed harmoniously with art 4(1) of the FC. The two provisions cannot be construed so as to give rise to a significant and fundamental difference relating to the jurisdiction and ambit of judicial power. The seeming anomaly that arises if a literal reading of
G the express words of these two articles is considered is this.

[112] Article 4(1) of the FC allows the Judiciary to strike down legislation ie federal law that is inconsistent with the FC. However art 121(1) of the FC, on a literal reading, appears to suggest that judicial power is circumscribed by
H and/or under federal law.

[113] The latter proposition means in effect that the powers of the Judiciary are established and delineated by federal law as enacted by Parliament. That has the effect of:

I

(a) abrogating inherent judicial powers including the power to scrutinise legislation for constitutional validity;

(b) ignoring completely the effect of art 4(1) of the FC; and

(c) effectively imposing a constitutional system of Parliamentary supremacy as opposed to constitutional supremacy

[114] With the greatest of respect, such a construction is wholly untenable. A harmonious construction of judicial power as contained in these two articles would entail ensuring the doctrines of a separation of powers and the rule of law remain as foundational features of judicial power.

[115] Therefore in construing art 121 of the FC in relation to the phrase '... shall have such jurisdiction and powers as may be conferred by or under federal law' the only harmonious meaning that can be accorded to those words is that the *specification, description and arrangement of the powers of the courts is to be enacted by Parliament.* However any such description or listing or setting out of the powers of the various courts in the hierarchy of the judicial arm of government by Parliament, *cannot in any manner derogate the powers of the courts to to act as a check and balance vis a vis the Executive and the Legislature, as enshrined in art 4(1) of the FC.*

[116] *Put another way, Parliament under art 121 may enact laws specifying, arranging and describing the powers of the courts, which are not detailed in the FC, in accordance with the foundational principles of the rule of law and separation of powers as set out in art 4(1) of the FC.*

[117] To read art 121 of the FC in any other manner would be to do violence to the basic and foundational structure of the FC. In order to retain its role under art 4(1) of the FC, art 121(1) of the FC cannot be given the literal reading adopted in the majority decision in *Kok Wah Kuan* and since overruled in the trilogy of cases of *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo.*

[118] The present case serves to cement the position that the powers of the court were never abrogated or removed by the 1988 amendment, given the continued existence of art 4(1) of the FC throughout, thereby enabling the courts to continue to exercise their powers to strike down federal law where it was inconsistent with the FC.

Meaning of 'law' in arts 121 and 4 of the FC

[119] A second line of reasoning that supports such a construction is that 'law' or 'federal law' as enunciated in art 121 of the FC must have the same meaning as 'law' in art 4(1) of the FC. If not so, and the word 'law' in both articles carried different meanings, there would be confusion and the FC would be anomalous, unpredictable and unreliable. Such a jarring construction is again unsound.

[120] And 'law' in art 4(1) of the FC must refer to 'law' that is valid under the

FC. It follows that 'law' under art 121 of the FC must also be law that is valid under the FC. That in turn means that any 'federal law' as stated in art 121 of the FC can be constitutionally challenged to ensure that it is constitutionally valid under art 4(1) of the FC. And only the courts can ascertain this issue. So the courts will only enforce, recognise and give effect to law that is constitutionally valid.

[121] It follows that Parliament cannot enact any law and expect the courts to exercise their judicial power in accordance with such law, no matter its content and no matter whether it conforms to the FC or not. So the courts only act in accordance with constitutionally valid federal law, where the role of ascertaining constitutional validity falls on them.

[122] Again therefore art 121 of the FC cannot be construed to mean that the Judiciary is bound to act in accordance with any federal law enacted. As such the 1988 amendment did not result in an erosion of powers at all, even if that was the intent. Objectively viewed, given art 4(1) of the FC, judicial powers remained intact.

[123] As stated earlier, the fact that the courts continued to retain the power to test the constitutional validity of legislation post-1988, and did in fact do so, lends greater force to this construction. The fact that the Judiciary declined to do so in cases such as *Nasharuddin* and *Lee Kew Sang* does not, with respect, support the proposition that the courts were bound to give effect to ouster clauses in relation to preventive detention.

[124] In light of the foregoing construction that judicial power under the FC remains and has always remained intact, s 15B of the POCA cannot possibly have the effect of divesting the courts of their power to scrutinize legislation and Acts following from such legislation to ensure that they are constitutional.

[125] *However it must be noted that the scope and ambit of art 4(1) in relation to s 15B POCA is limited. The effect of s 15B being declared unconstitutional, is that it allows the courts to judicially scrutinise the decision in issue, applying the full powers of judicial review available to a court of law exercising its supervisory function. It does not automatically follow that the act or decision of the Minister or the Inquiry Board is invalid or void.*

[126] It may well be the case that the challenge is unsuccessful and that the acts or decisions made within the particular legislation or 'law', in this case POCA, is found to be valid on administrative law principles.

[127] *But with ouster clauses we are not dealing with the constitutionality or otherwise of legislation on its substantive merits. We are dealing with the right to*

challenge the constitutionality of legislation. If ouster clauses were allowed to prevail then that right of challenge in art 4(1) of the FC would be eroded.

[128] *To that extent art 4(1) is the fountainhead of the FC and reflects the essence of democracy in that it comprises the fundamental right of the people of this nation to guard against arbitrary, invalid or wrongful legislative and executive acts or omissions.*

The adjectival mode of challenge

[129] To complete the picture on the ambit and scope of art 4(1) of the FC, an ancillary but important issue is how the challenge in relation to the constitutionality of 'law' is made. I have concluded above that in keeping with the doctrine of the rule of law as expressly espoused in art 4(1) of the FC, it is Judiciary or the courts that make the determination of whether 'law' is consistent or inconsistent with the FC.

[130] The fact that art 4(1) of the FC does not descend into the particulars of how such challenge is brought in the courts, in no way detracts from a citizen's substantive legal right to do so. In point of fact, the mode of challenging the constitutionality of legislation (or statutory provisions in such legislation) is set out in the Courts of Judicature Act 1964 ('the CJA').

[131] In other words the CJA affords the adjectival remedy to give effect to art 4(1) of the FC. Section 25 of the CJA provides for the additional powers of the High Court which include the right to issue prerogative writs such as certiorari or judicial review, mandamus, habeas corpus and such other proceedings as may be necessary to give effect to the right to challenge the validity of legislation. These common law remedies are given effect by inclusion in the CJA. Habeas corpus is another means of judicial review. Additionally the Criminal Procedure Code ('the CPC') in s 363 also affords the adjectival basis for the bringing of habeas corpus applications.

[132] Therefore the prerogative writs such as judicial review or habeas corpus comprise the mode or vehicle through which art 4(1) of the FC is given life or effect. If these procedural or adjectival modes of challenging the constitutionality of legislation are not allowed, then art 4(1) of the FC would be rendered nugatory or ineffectual. These prerogative writs such as judicial review comprise the life blood/pacemaker of art 4(1) of the FC. Article 128(2) of the FC and s 84 of the CJA provides other means of challenge of the constitutionality of legislation.

[133] Given the actuality of art 4(1) of the FC and the adjectival provisions which allow for its enforcement, it follows that legislation or statutory

provisions, such as s 15B of the POCA which purports to preclude or oust judicial review or the jurisdiction of the courts is null and void.

CONSTITUTIONAL SUPREMACY VERSUS PARLIAMENTARY SOVEREIGNTY

The position in earlier case law

[134] The arguments articulated above have not been considered or raised in the not inconsiderable history of case law in this jurisdiction on preventive detention. A good starting point for a consideration as to why or how this came to be, is borne out by the decision in *Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia* [1969] 2 MLJ 129 ('Karam Singh').

[135] This case is often cited primarily for the purposes of determining whether a subjective or objective test should be utilised in determining whether Ministerial discretion has been exercised correctly or otherwise in the course of judicial review. However, *Karam Singh* is of importance in the present context, because it traces the history of the path taken by our courts in adjudicating on preventive detention.

[136] The path taken by our courts has generally been that of examining the relevant statute within its confines, with a view to ascertaining or interpreting Parliamentary intent. This accords with English administrative law principles. This is exemplified in *Karam Singh*.

[137] In that case, in the course of reviewing Ministerial discretion, there was, with the greatest of respect, little or no consideration given to the fundamental difference between constitutional law in Malaysia and the United Kingdom. The stark and essential difference, often cited, but less appreciated as stated at the outset, is that the FC reigns supreme in Malaysia while Parliament is supreme in the United Kingdom.

[138] That single but immeasurable difference makes legislative action sovereign in the United Kingdom, but not in Malaysia. Our FC affords the inalienable right to the citizens of Malaysia to challenge enacted legislation in our courts, with a view to striking it down for inconsistency with the FC. No comparable right subsists in British constitutional law.

[139] The general position taken by our courts in earlier case law, was to defer to executive policy decisions on national security grounds, as evident in *Karam Singh*, which dates back to 1969. In that case the then Supreme Court adopted the now discarded and overruled majority decision of the House of Lords in *Liversidge v Anderson* [1942] AC 206. The reasoning there was that as long as

the detaining authority was subjectively satisfied that the detention was necessary to ensure that the detainee did not act in a manner prejudicial to the country's security, it was sufficient to deem the exercise of discretion unreviewable.

[140] The rationale was that security matters fell within the purview of the Executive, which arm is therefore best positioned to determine these matters, and certainly not judges. This is exemplified by Azmi LP's reasoning (affirming Lord Macmillan's judgment in *Liversidge v Anderson* [1942] AC 206 at p 253):

> ... how could a court of law deal with the question whether there was a reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, not of fault? A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share.

[141] The adoption of this stance meant that the courts here, like the United Kingdom, effectively accepted the legislation passed by Parliament as being absolute, and incapable of scrutiny from a constitutional aspect. *This meant in turn that the issue of ascertaining the whether the decision or legislation fell within the purview of the Constitution, notwithstanding that it had been enacted under art 149, was never considered.*

[142] As pointed out by Emeritus Professor Shad Saleem Faruqi, the English concept of parliamentary supremacy 'wrongly found its way into many Commonwealth courts which developed a reluctance to review an act of parliament on the ground of unreasonableness, lack of proportionality or harshness ...' (see for example *Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156).

[143] However parliamentary supremacy has no place in Malaysia as expressly stipulated in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112; [1976] 1 MLRA 410. All laws enacted by Parliament are subject to judicial review by reason of arts 4(1), 121, 128 and 162(6) of the FC. Notwithstanding *Ah Thian*, Malaysian jurisprudence particularly in relation to preventive detention has remained under the influence of the British doctrine of parliamentary supremacy. This is borne out by our case law which has approached the review of ministerial acts under preventive detention purely from an administrative law perspective, rather than from that of constitutional validity under the FC. The conceptual distinction between judicial review under constitutional law as opposed to the administrative law context has not been applied or undertaken.

[144] As a consequence, the provisions in the FC, which clearly envisage that fundamental liberties as set out in Part II of the FC require protection, were somewhat abrogated at best, or simply ignored at worst. The net result was that

there were no effective legal checks on legislative powers or the exercise of executive power, which is contrary to art 4(1) of the FC, our express constitutional provision on the rule of law.

[145] Matters progressed further down this path when Parliament amended the Internal Security Act 1960 in 1989 to insert an ouster clause namely s 8B(1), to restrict judicial review to only matters relating to procedural non-compliance. The Executive was further immunised from any form of check and balance.

[146] In like manner such ouster clauses found their way into other preventive detention legislation such as POCA.

[147] In *Nasharuddin* the rationale and reasoning adopted in *Karam Singh* was affirmed by Steve Shim FCJ in this court in the following terms (at p 406):

> ... In my view, the words in s 8B are explicit. They are clear and precise. They are exclusionary in nature and effect. The intention of Parliament is unmistakably obvious ie, that the jurisdiction of the court is to be ousted in terms stated in s 8B. In the premises, adopting the test taken by the Federal Court in *Sugumar Balakrishnan*, the court must give expression to Parliament's intention. Section 8B is therefore intended to exclude judicial review by the court of any act done or any decision made by the Minister in the exercise of his discretionary power in accordance with the ISA except as regards any question on compliance with any procedural requirement relating to the act or decision in question.
>
> Given the proper interpretation to be placed on s 8B what is the position in the instant case? Here, there is evidence that the impugned order was issued by the relevant Minister. There is also evidence that he had issued it in the exercise of his discretionary power under or in accordance with s 8(1) of the ISA. Furthermore, evidence shows that all the necessary procedural requirements had been complied with by the Minister in issuing the detention order. Indeed, the respondent made no complaint on this score.

[148] The twin approaches found in *Nasharuddin* and other case law in this area, all deal with *the interpretation of Parliamentary intent within the legislation under consideration.* There is no consideration of the constitutional aspects of the impugned legislation, which is permissible under the doctrine of constitutional supremacy in our FC.

[149] This is not permissible under English judicial review jurisprudence, which is premised on parliamentary sovereignty and must therefore work within the confines of ascertaining or interpreting Parliamentary intent. The examination is confined to whether Ministerial discretion has been exercised correctly or ultra vires the legislation.

[150] The interpretive powers of the courts are focused on ascertaining the intent of Parliament when enacting the law and determining whether the Minister has acted outside the given mandate. That is the reason why the English decisions are based on whether a Minister has exercised his discretion ultra vires the Act.

[151] In other words, the courts undertake the function of ascertaining whether Ministerial acts are effected in accordance with parliamentary intent. There can be no consideration of whether the legislation or the Executive act is itself fundamentally constitutional. The ultra vires theory only allows the courts in that jurisdiction to ascertain whether Parliamentary intent as provided in the legislation has been given effect.

[152] Therein lies the difference between our jurisdiction and that of the United Kingdom. It is open to the courts in this jurisdiction to not only examine the exercise of the Minister's discretion but to also examine and declare void, if necessary, legislation or statutory provisions that purport to restrict such a right in a manner inconsistent with the FC. Ultimately the purpose of art 4(1) of the FC is to ensure that both procedurally and substantively, the underlying legislation and the relevant statutory provisions are constitutionally enacted, and secondly whether the exercise of Ministerial discretion is constitutionally exercised, or exercised in accordance with administrative law principles.

[153] In doing so, the courts are bound to balance the fundamental liberties accorded in Part II of the FC against the national security needs of the country. As stated earlier, it may well be that legislation is ultimately found to be constitutional, as many of the fundamental liberties are effectively suspended in relation to such legislation. However, the examination process involves a consideration of both constitutionality as well as the 'vires' of the Ministerial discretion.

[154] Both access to justice and adherence to the rule of law are ensured in this jurisdiction under the FC.

[155] Ultimately constitutional supremacy has a far wider reach in terms of checking governmental power than parliamentary sovereignty as practiced in the United Kingdom. As such, these principles as contained in the FC, should form the normative basis for judicial review rather than the limiting jurisprudence of the United Kingdom. It is in this context that the history of our case law has failed to differentiate between two disparate systems of jurisprudence.

[156] The consequence of this disparity is that in interpreting legislation, our courts are bound to give effect to constitutional provisions. This is particularly so when a statute is capable of more than one construction. This, in turn, means adopting an interpretation that seriously considers and gives weight to the need to protect human rights and adhere to the rule of law. The provisions seeking to derogate from fundamental liberties should be restrictively construed, such that any derogation must be stated in clear and unequivocal terms.

[157] The fact that art 149 of the FC allows for the abrogation of certain constitutional rights including art 5(1) of the FC does not mean that the court cannot adopt an interpretation which seeks to intrude minimally on such fundamental liberties. Article 149 is not a licence to forfeit fundamental liberties altogether.

[158] Legislation enacted pursuant to art 149 of the FC should defer to the general tenor of the FC, which enshrines the rule of law, and to that extent recognizes that there are express limits on legislative and executive power. Adopting a literal approach to preventive detention legislation would allow for arbitrary and unfettered discretion cannot be right.

[159] Nothing stated here should be construed as in any manner demeaning the immense importance of security measures deemed necessary by the legislative and executive arms. Legislative and executive responsibility is acknowledged by the fact that the constitutionality of such legislation is a difficult hurdle to cross.

Lee Kew Sang and other case law

[160] As alluded to earlier, Parliament in 1989 sought to immunise executive or ministerial acts under introducing wide ranging ouster clauses precluding the courts from reviewing preventive detention.

[161] This court in several decisions held that the ouster clauses were valid and enforceable. Of primary relevance is the case of *Lee Kew Sang*. This case is of considerable importance because it is the basis on which all subsequent habeas corpus applications relating to preventive detention have and continue to be decided.

[162] The appeal there involved a consideration of POCA, but in the course of doing so, the Federal Court speaking through Abdul Hamid Mohamad FCJ (later CJ) considered the provisions of other preventive detention legislation including the then Internal Security Act 1960 and the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the DDA (SPM)'). Consideration

was given to the ouster clause in ss 7C and 7D of the POCA (since amended) precluding judicial review save on the grounds of procedural non-compliance.

[163] In setting out a detailed chronology of cases dating from the 1960s until 2005, the court dealt with two major issues — firstly, the issue of whether a *subjective or objective test* ought to be adopted in reviewing the exercise of Ministerial or police discretion in preventive detention cases; secondly, the effect of ouster clauses as set out in ss 7C and 7D of the POCA and other similar legislation. It is the second aspect that is of relevance at this juncture.

[164] With regard to ouster clauses, it was pointed out that after the amendment, there ought to have been no grounds on which the Minister's discretion to order preventive detention would be challenged save for noncompliance with procedural requirements. Surprise was expressed that scant respect was afforded to the amendments as in several cases the grounds of challenge still sought to rely on substantive grounds such as mala fides.

[165] Abdul Hamid Mohamed FCJ held that the courts were bound to give effect to the amendments. The ratio of the case in relation to ouster clauses is contained in the following paragraph:

> *In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them.* So in a habeas corpus application where the detention order of the Minister made under section 4(1) of the Ordinance or, for that matter, the equivalent ss, in ISA 1960 and DD(SPM) Act 1985, the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider, whether on the facts, there has been non-compliance. (Emphasis added.)

[166] And that indeed has been the approach adopted by the courts since 2005 in relation to all preventive detention law. From the earlier analysis, relating to art 4(1) of the FC, it is apparent that in *Lee Kew Sang* this court did not consider that the FC itself allows the ouster clause to be challenged as it purports to preclude the courts from undertaking any form of review of the exercise of Ministerial discretion, save in terms of procedural non-compliance. The court instead took the position that where law has been enacted by Parliament, then it is incumbent upon the courts to follow the law, without question.

[167] In so concluding, no account was taken of the role of the court under the FC as comprising the arm of government that provides checks and balances for both legislative and executive action or omissions. Again it is stressed that the mere fact of challenge does not mean unequivocally that legislation or a particular statutory provision will be held null and void. On the contrary, the provision might well be found to be constitutional, particularly in relation to legislation enacted pursuant to art 149 of the FC, where infringement of several fundamental liberties does not in itself render legislation null and void, in the interests of national security.

[168] In light of the fact that this court in *Lee Kew Sang* failed to consider or give effect to art 4(1) of the FC , I am of the view that decision is per incuriam. In my view, it is necessary for this court to depart from the decision in *Lee Kew Sang* as it gives effect to the validity and constitutionality of ouster clauses generally. That in my respectful view is erroneous.

[169] In *Lee Kew Sang*, there was a failure to point out to this court that unlike the United Kingdom, the challenge to ss 7C and 7D of the POCA was not merely subject to an interpretive function to ascertain and give effect to Parliament's intent. This is because in the United Kingdom, Parliament being supreme, the Judiciary's role is different, and confined to interpretation of the ouster clauses.

[170] Such interpretation is undertaken in that jurisdiction by giving such clauses a very narrow and confined meaning, so that that any attempt to oust the jurisdiction of the court must be absolutely clear. When these interpretive principles are applied in this jurisdiction, the necessary result is that prima facie, the jurisdiction of the court to undertake judicial review (as defined in those sections) is precluded.

[171] But to apply those interpretive principles *alone*, is inherently flawed in the context of our jurisdiction, where the Constitution is supreme. The validity and constitutionality of those statutory provisions has to be measured against the provisions of the FC.

[172] Having done so, it is undisputable that art 4(1) of the FC carries the right of review of legislation to determine the constitutionality of the same.

[173] To reiterate therefore, any statutory provision enacted with a view to ousting the court's jurisdiction to determine the constitutionality of a provision, infringes art 4(1) of the FC itself. Such a transgression renders any such statutory provision null and void. The right of challenge of enacted legislation cannot be ousted. For this reason, it is again apparent that s 15B of the POCA is null and void.

The approach to be adopted

[174] What then is the correct approach to be adopted when reviewing preventive detention legislation in light of ouster clauses as contained in s 15B of the POCA?

[175] In determining the approach to be adopted it is instructive to refer to two recent decisions from other jurisdictions that reflect the contemporary approach to ouster clauses:

(a) the decision of the UK Supreme Court in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22 ('Privacy International'); and

(b) the decision of the Singapore Court of Appeal in *Nagaenthran a/l K Dharmalingam v Public Prosecutor and Another Appeal* [2019] 2 SLR 216; [2019] SGCA 37.

Privacy International

[176] *Privacy International* concerned the Investigatory Powers Tribunal ('IPT') a special tribunal established under the UK statute known as the Regulation of Investigatory Powers Act 2000 ('the RIPA') with jurisdiction to examine the conduct of the intelligence services. Section 67(8) of the RIPA provides:

> Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.

[177] The issue before the courts was whether s 67(8) ousted the court's power to review the IPT's decision on the ground of error of law. By a 4–3 majority, the Supreme Court held that it did not. However it was held that s 67(8) would be effective in ousting the court's power to review the IPT's decision on errors of fact even those going to jurisdiction. Two major points may be gleaned from this judgment which emanates from a jurisdiction governed by the doctrine of parliamentary supremacy:

(a) first, the limit of Parliament's power to exclude review is ultimately determined by the rule of law:

  (i) the scope of judicial review should be no more and no less than is 'proportionate and necessary' to maintain the rule of law. Not every case requires the same level of scrutiny, all depends on the circumstances (see paras 92–96, and 132);

  (ii) where the form of an ouster clause satisfies such a test, it will be held

to be effective. A limited scope of judicial review can be justified as providing a sufficient and proportionate level of protection in some cases;

(iii) it is for the courts, not the Legislature to determine the limits set by the rule of law to the power to exclude review. The court can deny the effectiveness of an ouster clause by applying the rule of law. It is ultimately for the court to determine the extent to which an ouster clause should be upheld (paras 123 and 131) and

(iv) consistent application of the rule of law requires that the law applied by a specialist tribunal is not developed as a 'local law' in isolation but conforms to the general law of the land. Since legal issues decided by the IPT may have implications beyond its remit, the rule of law requires its errors of law to be susceptible to review in appropriate cases (para 139).

(b) secondly a more flexible and pragmatic approach is required to determine the scope of judicial review:

(i) the courts have not adopted a uniform approach, but have been free to adapt or limit the scope and form of judicial review. This is to find an appropriate balance between respecting legislative Legislature on one hand and upholding the rule of law on the other (para 130);

(ii) in determining the extent to which an ouster clause should be upheld, the court should have regard to the purpose and statutory context, and the nature and importance of the legal issue in question (para 134); and

(iii) what is required is a more evaluative approach guided by certain fundamental principles. A relevant factor is 'whose relative opinion on the question should be held to be authoritative' (paras 83–84).

[178] It is apparent from the foregoing that despite Parliament being supreme in the UK, the courts have adopted a robust stance in holding that it is for the courts and not the Legislature to determine 'the limits by the rule of law to the power to exclude review'. In short, the courts will adhere to the rule of law and in appropriate cases hold that the rule of law precludes the exclusion of judicial review.

[179] Under our FC, the Judiciary has been accorded specific powers under art 4 of the FC to undertake the exercise of judicial review, when a challenge is made to the constitutionality of a law. Far greater powers have been accorded to the courts in this jurisdiction. And this is ultimately to ensure compliance with the rule of law. If the UK, despite being a jurisdiction where Parliament is

supreme, can determine that even Parliament is subject to the rule of law, what more in the context of our jurisdiction where such powers have been expressly provided under art 4 of the FC (and the adjectival mode of doing so provided under the CJA as well as the CPC).

[180] However it is equally important to note that any such judicial review that is undertaken ought to be no more or no less than is proportionate and necessary to maintain the rule of law in the context of the statute or statutory provision in issue. What this means in the present context of s 15B of the POCA is that the courts must circumscribe their powers of judicial review to ensure that the courts do not usurp or seek to substitute their decisions in place of that of the Board. To that extent *it is the legality of the decision in issue that is subject to judicial scrutiny*. This means that the Minister's decision is authoritative unless it is found to be made with mala fides or for a collateral purpose. Further it is also open to judicial scrutiny on the available bases for judicial review in this jurisdiction, namely illegality, irrationality and procedural impropriety (which already forms a basis). A decision would also be subject to judicial review where it is premised on an illegal basis.

[181] The extent of judicial scrutiny will depend on the facts of each particular case, but the courts should restrain themselves from intervening on the basis of the factual merits of the Board's decision.

Departure from Anisminic

[182] The third aspect of *Privacy International* that is of importance is that the majority departed from the famous *Anisminic* approach to ouster clauses. In *Anisminic*, the position adopted was that only errors of law that took the tribunal outside its jurisdiction would render the determination a nullity. Not all errors of law render a determination a nullity (see paras 48–50). The UK Supreme Court went on to hold that the approach in *Anisminic* is 'highly artificial' and 'somewhat insulting' with an 'obscure' conceptual basis. The discussion on ouster clauses needs to move beyond the *Anisminic* framework. The proper approach should not be based on 'somewhat technical debates' on 'elusive' concepts such as nullity and ultra vires (see paras 79, 82, 99, 128, 129 and 132).

[183] This aspect of the decision in *Privacy International* is of importance because cases in this jurisdiction have routinely relied on *Anisminic* to ascertain the validity of ouster clauses and in their general approach to decisions sought to be quashed. It is apparent that with the UK Supreme Court itself departing from *Anisminic* on the basis that it is somewhat technical and artificial to be mired in debates about errors of law going to nullity et cetera, it is time indeed for adjudication on judicial review in this jurisdiction to cease to rely so wholly

on *Anisminic* and the principles set out there.

[184] In our jurisdiction, the foremost consideration is the constitutionality of the statutory provision or statute given the existence of art 4 of the FC. If the statutory provision in question is constitutionally valid, then the decision comes under judicial scrutiny by way of judicial review. It is at this juncture that the principles of administrative law come into play and it is apparent that the overriding principle that must be adhere d to is t he rule of la w.

[185] In the context of the particular statute in question in this jurisdiction, such as s 15B of the POCA, as the ouster clause is unconstitutional, it follows that the attempt to preclude judicial scrutiny is invalid. Accordingly the Board's decision *is* subject to judicial scrutiny to ascertain whether his decision is consonant with the rule of law, applying the principles of administrative law.

[186] As stated earlier, in the context of s 15B, the proportionate and necessary judicial scrutiny to be undertaken is whether the Board's decision to detain the detainee under POCA is tainted with illegality or mala fides and whether it is consonant with the objectives of the legislation and art 149 of the FC. It is subject to the normal principles of judicial review where the court undertakes to ascertain whether the decision is tainted by illegality, irrationality and procedural impropriety. This does not translate into an intricate study of the factual basis for detention. Judicial scrutiny is circumscribed as outlined above.

The decision of the Singapore Court of Appeal in Nagenthran

[187] In 2012 the Singapore Misuse of Drugs Act ('the MDA') was amended to give the court a discretion to sentence the offender to life imprisonment instead of death subject to two conditions: namely that the offender was a mere courier, and that the public prosecutor issues a certificate that the offender had substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore. Section 33B(4) of the MDA limits the grounds on which the court can review the determination of the public prosecutor whether or not to issue the certificate in the following terms:

> The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and *no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.* (Emphasis added.)

[188] The public prosecutor declined to issue the certificate for the appellant. The appellant challenged the decision by way of judicial review. It was

contended on behalf of the appellant that he had in fact rendered substantive assistance to the Central Narcotics Board by providing information. In the earlier case of *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 the Court of Appeal held that giving the public prosecutor the sole discretion to issue the certificate was within the legislative power on sentencing and did not violate judicial power. The issue in *Nagaenthran* was whether s 33B(4) of the MDA precluded judicial review of the public prosecutor's decision on grounds other than bad faith or malice.

[189] The Singapore Court of Appeal held that s 33B(4) precluded judicial review of the merits of the decision but not the legality of the decision. In its unanimous judgment the court, speaking through the Chief Justice, Sundaresh Menon made the following points:

(a) s 33B(4) is not an ouster clause but an immunity clause;

(b) its purpose was to immunise the public prosecutor from suit except on the grounds of bad faith or malice;

(c) the section does not exclude the jurisdiction of the court to review the legality as opposed to the merits of the PP's decision;

(d) the court can review the decision on the usual grounds of judicial review, such as illegality, irrationality and procedural impropriety (see paras 47, 50 and 68);

(e) the merits of the public prosecutor's determination is not capable of being reviewed by a court. This is because the issue of whether there was substantial assistance or not is a matter that requires wide-ranging assessment which a court is simply not equipped to assess. It might also require the consideration of some materials that are not admissible evidence;

(f) 'the courts are simply ill-equipped and ill-placed to undertake such an inquiry';

(g) the disclosure of confidential information, such as intelligence and operational details of the Central Narcotics Bureau, might jeopardise the effectiveness of the war on drugs and is 'a very significant concern'. The Court of Appeal pointed out that as s 33B(4) does not oust review on legality as opposed to merits, there is no infringement of judicial power;

(h) the court's power of judicial review is a core aspect of judicial power. This follows from the supremacy of the Singapore Constitution in art 4; and

(i) a provision ousting the court's power of judicial review would be constitutionally suspect for violating the constitutional principles of judicial power and the separation of powers.

[190] It follows from the *Nagaenthran* that the constitutional supremacy provisions of art 4 preclude the efficacy of ouster clauses which encroach upon and seek to restrain the exercise of judicial power under the FC. This decision further bolsters the position adopted earlier in this judgment in relation to arts 4 and 121. However it is equally clear that the scope and ambit of judicial review is clearly circumscribed and the courts should confine such scrutiny to the legality of the decision by the application of the well-accepted principles of ascertaining whether the decision is tainted by illegality, irrationality or procedural impropriety. An extensive factual assessment is inappropriate, as the courts are simply not equipped to do so. To this extent a judicial review premised on the factual basis of the Board's decision is not permitted.

[191] In the present case, as s 15B of the POCA is null and void and therefore ineffective, it follows that it is open to the court to review:

(a) the legality of the exercise of Ministerial discretion, so as to ascertain whether the decision was in accordance with the intent and object of POCA and meets the requirements of legitimacy proportionality and procedural propriety (see *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935; [1984] UKHL 9 ('the GCHQ case')). In this context it is important to emphasise that the exercise of the Board's discretion may be judicially scrutinised in respect of matters other than procedural non-compliance; and

(b) in other words, not only are matters disclosing procedural non-compliance available for review, other substantive matters are equally available for review in the course of determining habeas corpus matters. The courts are not restricted to examining those decisions within the narrow confines of mistakes relating to procedure stipulated in the relevant legislation in the course of detaining a person under such legislation.

[192] Therefore it is open to the courts to consider both procedural and substantive grounds in reviewing the exercise of discretion of the Board in the course of a habeas corpus application. It is equally open to the courts to review the constitutionality of the underlying legislation to ensure that it falls within the ambit of art 149, as that is a matter of legality. However that is not the subject matter of adjudication before us, and will not be considered.

POST SCRIPT: JUDGMENT OF RIGHT HONOURABLE THE CHIEF JUSTICE IN MARIA CHIN ABDULLAH V KETUA PENGARAH IMIGRESEN & ANOR [2021] 1 MLJ 750 ('MARIA CHIN')

[193] Pending the delivery of this judgment, the Federal Court delivered its judgment in *Maria Chin*. I respectfully adopt my reasoning in my dissenting

judgment which concurs with the judgment of the Right Honourable the Chief Justice of Malaysia. The issue of law there is identical to the issue of law here, save that the present case deals with the constitutionality of an ouster clause in legislation enacted pursuant to art 149(1) of the FC.

[194] The reasoning of the Chief Justice in that case is pertinent to the issue of law here and I would respectfully refer to the following passages from Her Ladyship's judgment which are of particular significance here and which is consonant with what I have expressed in this judgment.

[195] With respect of arts 4(1) and 121(1) of the FC and judicial power, this is what the learned Chief Justice said:

> [70] Coming back to the FC, any law passed inconsistent with the provisions of the FC are void. But, it is obvious that the FC is not self-executing. It cannot therefore proactively protect itself from breach. The organ of Government tasked with this onerous obligation is the Judiciary. The power to do it is loosely described as judicial power and the mechanism by which it is done is called judicial review.
>
> ...
>
> [75] The answer to the criticism may be provided thus: this court in both *Semenyih Jaya* and *Indira Gandhi* appeared to have taken the approach of reading down the 1988 amendment to art 121(1). Having taken that approach, there was thus no real need to expressly strike down the amendment to art 121(1). Similar effect had been achieved by reading down the amendment.
>
> ...
>
> [77] Accordingly, art 121(1) should be read in the sense that the words 'the judicial power of the Federation shall be vested in the two High Courts of co-ordinate jurisdiction and status' still exist despite their deletion and in the same vein, the words inserted by the 1988 amendment to the extent that 'the High Courts ... shall have such jurisdiction and powers as may be conferred by or under federal law' as having no effect whatsoever of diminishing or subordinating judicial power to Parliament or declaring Parliament supreme in any way.
>
> And on the issue of the role of the Judiciary:
>
> > [103] The holding that ouster clauses are invalid does not in any way suggest that the Courts are now supreme. As the guardian of the FC, the Judiciary must forever remain mindful that there are certain matters in which it cannot trespass. The larger point to be made is that the Judiciary too must observe the doctrine of separation of powers ...

[196] The ratio decidendi extracted from CCSU is that on the facts of certain cases, the Judiciary cannot tread into certain matters as they may fall within the prerogative of the Executive. In the larger context, the reason for this self-imposed judicial exclusion is that the Judiciary is simply not armed with the expertise or the information to deal with those matters such as national

security. For example, judges are not privy to intelligence reports and secret police investigations. Lest I am misunderstood, the concept of non-justiciability does not mean that the Judiciary shirks its constitutional obligation to decide the legality of Government action or abstention. It also does not mean that the Judiciary can or does take instructions from the Legislature or the Executive as to what it can or cannot adjudicate. Although ouster clauses were not in issue before Their Lordships in CCSU, the lesson learned from that case is that the Judiciary has an inherent obligation to understand what it can and cannot adjudicate upon, given the inherent constitutional limits of the institution.

[197] Accordingly, given that the FC is supreme and how this is translated through judicial power, and in light of the right of access to justice, the rule can be summarised thus. All persons are equally entitled to approach the courts for a ruling as to their rights and liabilities. The courts are in turn constitutionally required to examine the claim on face value as they did in CCSU. However, whether the litigant is definitively entitled to the remedy sought is another matter entirely and it remains for the courts to decide on the facts and circumstances of each case whether the subject matter is justiciable. By way of example, it is insufficient for the Government to rely on an ouster clause as a convenient means to tell the courts what they can and cannot look at. Whatever concern they have may perhaps be more properly ventilated, in such cases, by way of an affidavit deposing why the matter is non-justiciable stating clearly the reason for the view eg national security.

[198] Finally I respond to some of the matters raised in the majority judgment. I refer to para 271 of the majority judgment. It is suggested there that the Reid Commission recognised that the scope and extent of jurisdiction and powers of the courts with the exception of the Supreme Court was determined by federal law. But the salient point that appears to have been left out, is that the reference to the Supreme Court in the Reid Commission Report is now equivalent to a reference to the current superior courts of Malaysia, namely the High Courts and the appellate courts. Therefore, jurisdiction is not confined or defined by federal law but is inherent judicial power as provided for in the FC under arts 4(1) and 121. In other words, to suggest that the judicial power of the superior courts is circumscribed by federal law by a reading of a portion of the Reid Commission report is simply flawed. In point of fact a reading of para 123 reveals:

> First, we consider that the function of interpreting the Constitution should be vested not in an ad hoc Interpretation Tribunal, as provided by the Federation Agreement, but (as in other federations) in the ordinary courts in general and the Supreme Court in particular. *The States cannot maintain their measure of autonomy unless they are enabled to challenge in the Courts as ultra vires both Federal legislation and Federal executive acts.* Secondly, the insertion of Fundamental liberties in the draft Constitution requires the establishment of a legal procedure by which breaches

of those Fundamental Liberties can be challenged.

[199] The highlighted portion makes it clear that the Judiciary was to be vested with sufficient powers to allow a challenge of federal law. As such it cannot be said that the Judiciary's powers were relegated or circumscribed by federal law. Therefore the drafters clearly intended that the Judiciary be constitutionally empowered to review legislative and executive acts. The argument that federal law may circumscribe judicial power or oust it entirely, as is suggested in the majority judgment and by the AGC, runs contrary to the intent and express provisions of the FC, particularly in arts 4(1) and 121 of the FC.

[200] As for para 276, where it is suggested that by reason of the existence of arts 149, 150 and 151, Parliament is at liberty to suspend fundamental rights by virtue of these special powers, it needs to be considered that the Reid Commission report expressly stipulates that any infringement of fundamental rights is only justified to such an extent as may be necessary to meet a particular danger. More pertinently it does not exclude art 4(1) of the FC as I have pointed out earlier, and this is pertinent because it means that where there is inconsistency with arts 4 itself, 8, 121, 151 and other articles in the FC which are not excluded, the courts retain the right to scrutinise executive action or review legislation. The majority judgment referred to para 174 of the Reid Commission report but did not quote it in full in that it did not highlight the following salient statement:

> ... It would be open to any person aggrieved by the enactment of a particular infringement to maintain that it could not properly be so regarded and to submit the question for decision by the Court ...

[201] This clearly shows that:

(a) art 4(1) of the FC was deliberately excluded from the list of derogated articles in art 149; and

(b) the court remained at liberty to scrutinise and review the subject legislation or executive acts emanating therefrom.

[202] Therefore, it is inaccurate and flawed to suggest that the courts are capable of being restrained or ousted by federal law.

[203] At para 60 it is suggested that the courts' powers of judicial review are statutory rather than constitutional. This again is incorrect by reason of art 4(1) where the express powers of constitutional judicial review are derived and recognised in the words 'any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'. At the risk of repetition, no law can be struck down unless the Judiciary

has the power to do so. It therefore defies logic that federal law which can be struck down by the Judiciary, may control and circumscribe judicial powers, contrary to art 4(1) of the FC.

[204] The majority also suggests that s 15B merely limits judicial review does not completely oust judicial power and it is not therefore a 'complete ouster clause'. This again fails to appreciate the definition of judicial review in the sense of the word. As stated by the Honourable Chief Justice of Malaysia in *Maria Chin*'s case:

> ... [68] The term 'judicial reviewin a wider and more holistic sense, is used to describe the exercise of judicial power of review by the Courts over the conduct of either the Legislative or the Executive branches of Government. It involves the application of the judicial mind of the assessment of the legality of their conduct. It is not an ancillary but integral and corollary feature of the Rule of law and democracy.

[205] Clearly relatively trivial matters like a computation of the number of days that transpire between the passing of reports, or the transportation of a detainee, or the number of sheets of paper that are provided to him to write his complaint can scarcely comprise judicial review.

[206] The next paragraph which warrants comment is para 285 where it is suggested by the majority that 'law' in art 4(1) of the FC means only ordinary laws, and excludes laws to amend the Federal Constitution under art 159. These propositions are taken from two judgments namely *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; [1975] 1 LNS 90 and *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70. In my view these judgments have been overruled by this court in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*. In any event these judgments failed to consider the overarching role of art 4(1) in the FC when seeking to sever 'federal law' in art 159(1) from art 4(1) as I explain below.

[207] Firstly, the use of the words 'ordinary law' is not to be found in the FC. The phrase employed in art 159(1) is 'federal law'. Federal law is defined in art 160 to mean:

(a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and

(b) any Act of Parliament.

[208] Whereas 'law' is far wider in its definition and includes 'written law' which in turn is defined as '... includes this Constitution and the Constitution of any State'. Therefore, federal law is and has to be subordinate to written law

as defined in the FC. It therefore follows that art 159(1) has to be subordinate to or follow upon art 4(1) of the FC. And this is important because it allows for any amending law to be struck down if it is inconsistent with the FC.

[209] Secondly, the precise words utilised in art 159(1) are 'the provisions of this Constitution' while art 4(1) stipulates anything inconsistent with 'this Constitution'. When juxtaposed it is evident that 'the provisions of this Constitution' must fall within or be subject to the far wider 'this Constitution'. The latter refers to the concept of the FC in its original form and as it has evolved to date. While the 'provisions of this Constitution' refers to the Constitution as it subsists at any given point in time only.

[210] The argument put forward by the majority is that only ordinary laws need to conform to the FC, and that laws seeking to amend the constitution do not, because if art 4(1) is given its proper construction, it would mean that Parliament could never amend the FC. This is, with respect, fundamentally flawed. It is incorrect to carve out art 159(1) as not being subject to art 4(1) because that does not accord with the definitions of 'law' in the FC itself as pointed out above.

[211] In point of fact art 4(1) is the fulcrum, and art 121(1) and art 159(1) both of which use 'federal law' can be harmoniously construed with art 4(1) of the FC. It follows that the amendment art 121(1) in 1988 when read that way is constitutionally valid. Therefore, Parliament can and did make a constitutional amendment without affecting either judicial power or the power of Parliament to amend the FC. As I have stated earlier, this entire problem has arisen by reason of the grammarian approach adopted by this court in *Kok Wah Kuan*.

[212] Moving on to para 66, it is suggested that because s 15B emanates from art 149, it cannot be subject to judicial scrutiny. And the reasoning for this is reliance on *Loh Kooi Choon* where it was stated that: 'the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself' (see p 190 of the case).

[213] However, s 15B is not part of the Constitution. There is a tangible difference between art 149 itself and s 15B, which is enacted as ordinary law pursuant to art 149. Therefore, the clear distinction cannot be papered over, and s 15B is subject to scrutiny under art 4(1) of the FC. It is not insulated simply by the fact that it was enacted pursuant to art 149. If that were the case any and all legislation enacted pursuant to particular articles of the FC would be immune from judicial scrutiny. That would render art 4(1) otiose. Even the Reid Commission report rejected this idea.

[214] It is suggested in the last two lines of para 287 of the majority judgment that a law cannot be struck down for being inconsistent with art 4(1) itself and that such law can only be struck down for being inconsistent with some other article in the FC. In other words, it is suggested that art 4(1) provides a mechanism for striking down and that that is its only function. This is misconceived. art 4(1) apart from stipulating that it is the supreme law of the land allows the Judiciary to strike down law that is inconsistent with 'this Constitution'. This means every article in the Constitution including art 4(1). It does not exclude art 4(1). Therefore, any law that seeks to prevent judicial scrutiny or review falls foul of art 4(1), because the purport of that article is to ensure that there is adherence to the FC. As I have pointed out earlier, if the court is precluded from even reviewing legislation for inconsistency how is art 4(1) to take effect? art 4(1) would be emasculated. The proposition in para 287 is therefore flawed.

[215] A further fundamental issue that has to be addressed is the fact that the law relating to the doctrine of basic structure is not in issue before us. This is evident from the clear acceptance of that doctrine in the seminal cases of *Semenyih Jaya* and *Indira Gandhi*, and which has been expressly acknowledged by the AGC in their submissions. Notwithstanding this, the majority judgment purports to strike down the doctrine. As it is not in dispute, or a part of the list, it ought not to have been addressed as being either flawed or inapplicable under our law, in the majority judgment. In choosing to focus on this issue, and in trying to preclude the use of the doctrine in this case, despite acceptance of the same by both parties to the lis a breach of natural justice has been occasioned. See *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196:

> An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. The court is not entitled to decide a suit on which no issue has been raised by the parties ...

[216] There are other general reasons why I am unable to agree with the majority judgment. I do not propose to highlight each and every point as I have set out the thrust of my legal reasoning in the main body of my dissenting judgment and the points I have mentioned above. The final observation is in respect of that portion of the majority that seeks to address the basic structure doctrine in the Malaysian context and their reasons for rejecting it. I can do no better than to quote from the Right Honourable the Chief Justice of Malaysia in *Maria Chin* in this regard:

> (v) Although judicial precedent plays a lesser role in construing the provisions of the FC, there is no reason for this Court, not to adhere to the doctrine of stare decisis. It is of supreme importance that people may know with certainty what the law is. Little respect will be paid to our judgments if we were to overthrow today what we have resolved the day before, especially if it concerns our supreme law — the Federal Constitution.

[217] In this context the majority have sought to distinguish the seminal decisions of this court in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo* on the grounds that the facts there are different. This ignores the ratio of those cases each of which clearly dealt with judicial power. It is therefore insufficient to use a basic factual matrix to distinguish such fundamental principles pertaining to the Federal Constitution.

CONCLUSION

[218] For the reasons set out above, I conclude that s 15B of the POCA is unconstitutional, and is hereby struck down for being inconsistent with art 4(1) of the FC. The appeals are allowed to that extent, namely that the appellants' applications for habeas corpus are no longer confined to a review of procedural irregularities under POCA. The appellants are entitled to raise and be heard in respect of any substantive matters pertaining to their detentions which reflect alleged illegality, a lack of proportionality or procedural impropriety.

[219] It follows from above that the decision and reasons of the Board for the detention of the appellants, are or ought to be available for consideration under these habeas corpus applications. This is in order to enable the court to ascertain whether the decisions of the respondents to detain the appellants under POCA, fall within the scope and ambit of that statute and art 149 of the FC.

[220] By reason of s 15B of the POCA, the respondents did not file any affidavits explaining the basis or the reasons for the detention of the appellants. It is therefore necessary to accord the respondents an opportunity to be heard in relation to the detention of the six appellants, by way of filing the requisite affidavits, if the respondents so desire.

[221] The original applications for habeas corpus are therefore fixed for further hearing in the High Court to afford the respondents the opportunity to file the requisite affidavits to explain and/or substantiate the reasons for the detention of the appellants.

Zabariah Yusof FCJ (delivering majority judgment of the court):

BACKGROUND

[222] The six appellants appealed against the decision of the learned Judicial Commissioner which dismissed the application by the appellants for a writ of habeas corpus. The six appellants were ordered to be detained under s 19A(1) of the Prevention of Crime Act 1959 ('the POCA') by the Chairman/Deputy

Chairman of the Prevention of Crime Board (Board) for a period of two years. Pursuant to the order, the respective appellants are to be detained at the respective Pusat Pemulihan Khas (PPK).

THE ISSUE IN THE APPEALS

The basis of the challenge

[223] Encik Najib Zakaria, counsel for the five appellants, Rovin Joty a/l Kodeeswaran, Darweesh bin Raja Sulaim, Ragu a/l Vitee, Devandren a/l James and Velu a/l Rajakumar indicated that he would be raising only one issue before this court, namely, whether s 15B of the POCA (an ouster clause provision) which purports to limit the exercise of judicial power is ultra vires art 121(1) of the Federal Constitution ('the FC') and therefore unconstitutional.

[224] Dato' Seri Gopal Sri Ram, counsel for the appellant Nivesh a/l Mohan, raised an additional issue in addition to the issue raised by the other five appellants, namely, whether s 7B of the POCA had been complied with by the Board.

[225] Corollary to the issues raised in paras [223] and [225] above, the following four points were raised by the appellants in the course of arguments, namely:

(a) s 15B of POCA which was enacted under art 149 which ousts the jurisdiction of the courts to perform judicial review is unconstitutional by virtue of art 4(1) of the FC;

(b) the ouster clause in s 15B of the POCA is an attempt by Parliament to suppress constitutional powers given to the courts as provided under art 121(1) of the FC. This will be taken together with the main issue as aforesaid;

(c) s 15B of POCA encroaches on judicial power thus breaching *the doctrine of the separation of powers* between the three branches, namely the Executive, Legislative and the Judiciary;

(d) s 15B of POCA which seek to oust the courts from exercising their rights under art 4(1) of the FC contravenes that very article and to that extent *contravenes the 'basic structure' of the FC*. We will address these four points in this judgment.

[226] In the present appeals we were also aided by the submissions of Datuk Gurdial Singh Nijar, and Dato' Shad Saleem Faruqi acting as amicus curiae.

SUBMISSION BY THE APPELLANTS

[227] Dato' Seri Gopal Sri Ram acting for and on behalf of the appellant, Nivesh submitted as his first ground in challenging s 15B of the POCA as being unconstitutional and void, that the said section infringes art 121(1) of the FC and should be struck down by this court. It is unconstitutional as it curtails the powers of the courts on the right to judicial review in relation to substantial merits of the Board's decision.

[228] Such infringement removes the constitutionally guaranteed right of any detenu to effectively challenge his detention in relation to substantive matters, not just in regard to any question on compliance with any procedural requirement in POCA, as it involves the fundamental rights of the appellant.

[229] The second ground is that the impugned provision impedes access to justice under art 5(1) of the FC. Following *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 access to justice is a fundamental right and an ouster clause has the effect of impeding such right. Access to justice has two dimensions, namely *substantial justice and remedial justice*. It is submitted that even if the appellant can show or established an *Anisminic* error following the decision of the House of Lords in *Anisminic v Foreign Compensation Commission and another* [1969] 2 AC 223 (*Anisminic*), there is nothing the appellants can achieve because the ouster clause is complete. The court cannot even enquire on an administrative plea and the appellant cannot cross the threshold because he could not invite the court to look into whether there is an *Anisminic* error. Effectively the ouster has impacted on the fundamental rights of the appellants on access to justice.

[230] He submitted that these appeals do not involve any novel question but settled principle of law based on the trilogy of cases, namely *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 (*Semenyih Jaya*), *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507(*Sivarasa Rasiah*) and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (*Indira Ghandi a/p Mutho*) which established that judicial review is part of the basic structure of the FC.

[231] The cases relied on by the respondents are pre *Semenyih Jaya.* If the court agree with the appellants, the Federal Court's decision in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105 (FC); *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289 (CA) (*Sugumar Balakrishnan*) would no longer be good law. It was submitted that *Indira Ghandi* and *Semenyih Jaya* had given those pre *Semenyih Jaya* cases a fatal blow.

[232] Save and except for *Sugumar Balakrishnan*, the court has so far adopted an approach on an administrative plane rather than the constitutional context in all of the case laws on ouster clauses. *Syarikat Kenderaan Melayu Kelantan Sdn Bhd v Transport Workers Union* [1990] 1 MLJ 5 and *South East Asia Fire Bricks Sdn Bhd v Neo-Metallic Mineral Products Manufacturing Employees Union & Ors* [1975] 2 MLJ 250 were all cases which dealt with ouster clauses in the administrative law context. It was submitted that this is the first time it is being approached on a constitutional basis.

[233] Dato' Seri Gopal Sri Ram adopted the opinions by Dato' Shad Saleem Faruqi and Datuk Gurdial Singh Nijar who acted as amicus curiae to the court in buttressing his argument and moving this court to strike down s 15B of the POCA on ground that it is unconstitutional.

[234] Encik Najib Zakaria, counsel for the other five appellants argued that since 1977, the Federal Court had decided that ouster clause cannot effectively oust the jurisdiction of court or salvage the illegality of detention by the Executive when the matters ventilated involved constitutional provisions. *Re Tan Boon Liat @ Allen & Anor et al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108; [1977] 1 MLRA 22 was referred to, as support for his proposition.

[235] It was also submitted by counsel of the appellants that judicial review forms a hallmark of judicial power which provides a crucial mechanism for ensuring the necessary checks and balances to ensure that the Executive and the Legislature act within their constitutional limits and the upholding of the Rule of Law.

[236] Applying the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 where Mohd Eusoff Chin CJ held that powers of the High Court is not limited to issuing prerogative writs but extends so far as to enable the court to issue any appropriate orders or directions, it is submitted that the courts have the power to review the decision of the authority on the merits and mould the relief according to the exigencies of the situation in order to satisfy the insistent demands for justice.

[237] Mohd Azmi FJ in *Majlis Peguam & Anor v Tan Sri Dato' Mohamed Yusoff bin Mohamed* [1997] 2 MLJ 271; [1997] 1 MLRA 302 agreed that once the Legislature confers powers on the courts, the judges should not shy away from those powers by setting up all kind of barricades along their path.

[238] Encik Najib Zakaria echoed the submission of Dato' Seri Gopal Sri

Ram on the prohibition by s 15B of the POCA to challenge the decision of the Board except on procedural non-compliance infringes upon the judicial power vested in the High Court to remedy, through judicial review, any unlawful detention as against any person who challenges the lawfulness/legality of his detention.

[239] Article 5(1) of the FC provides that:

> 5 Liberty of the person
>
> (1) No person shall be deprived of his life or personal liberty save in accordance with law.

This right is wide enough to encompass the right to be engaged in lawful and gainful procedure that under such article it allows the applicant to argue fresh issues subject to liberty of the person. The courts should treat the non-compliance to the appeal directory if the issues are substantial in nature and not frivolous.

[240] Counsel for the appellants submitted that the appellants had been deprived of their liberty not in accordance with law. Hence it is the submission by the appellants that s 15B(1) of the POCA is unconstitutional and ought to be struck down. As such deprivation is unlawful, the writ of habeas corpus is non-discretionary and must be issued by this court.

[241] Encik Najib Zakaria also relied on *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 (*Alma Nudo Atenza*) in submitting that the effect of the ouster clause share a similar sentiment and effect of the draconian provision of s 37B of the Dangerous Drugs Act 1952 which ultimately deprived the appellants from reasonable opportunity to succeed in his defence. Likewise the detenu in preventive detention has no appropriate chances of success in discharging the burden in proving that his detention is tainted with mala fide and as well affected his reasonable chance to succeed in making a representation.

[242] Counsel also asserted that although POCA is promulgated under art 149(1) of the FC, which allows suspension of certain provisions on fundamental liberties guaranteed in the FC to suppress subversion and/or action prejudicial to public order, it cannot restrict judicial scrutiny of legality of a decision of the Board to matters pertaining solely to procedural compliance. The wording of the said article states any law made pursuant to art 149 is valid notwithstanding that it is inconsistent with arts 5, 9, 10 and 13 only. However it was submitted that art 149 of the FC does not suspend the operation of arts 121 and 4 of the FC.

[243] It was further submitted that s 15B of the POCA violates the basic structure of the FC and the doctrine of separation of powers by impeaching judicial power as provided in art 121(1) of the FC.

[244] Encik Najib Zakaria urged for this court's indulgence for a complete release of the appellant on the basis that in cases of arbitrary detention involving habeas corpus application, complete release is the sole outcome if the detention process was declared null and void.

SUBMISSIONS BY THE RESPONDENTS

[245] The respondents assert that s 15B of the POCA is constitutional and that the appeals by the appellants are without merits and ought to be dismissed.

[246] POCA was enacted and amended pursuant to art 149 of the FC. It validates laws passed notwithstanding that it is inconsistent with arts 5, 9, 10 or 13. It is recognised that legislations promulgated under art 149 may provide for the curtailment of fundamental rights on grounds of public order and national security, of which s 15B under POCA is one of it.

[247] Preventive laws like POCA is a piece of adjectival law and does not create any substantive offence. Although the right to life under art 5 does encompass both adjectival and substantive law, however the fundamental liberties provisions in the FC are not without limits but expressed to be 'save in accordance with law'.

[248] The intent and purport of the amendments to POCA which inserted s 15B was clearly explained by the speech of the Minister of Home Affairs at the second and third readings of Parliament in the Dewan Rakyat as evidenced from the Hansard of Dewan Rakyat dated 1 October 2013 when tabling the said amendments to POCA, at pp 44–46. Essentially it is to address the worrying rise in the crime index, particularly in organised crimes or crimes by a substantial body of persons in the country, namely:

(a) the use of firearms;

(b) murder using firearms;

(c) gang fights wrestling for territorial control for drugs trafficking and crime activity;

(d) collection of protection money amongst traders or residents of residential areas;

(e) human trafficking syndicates; and

(f) gambling syndicates.

[249] The amendment Bill seeks to propose stricter laws to combat organised and grave crimes as such. If these crimes are not curbed, it will have an adverse effect on the economy of the country as it will instil fear amongst investors, locally and overseas as instability of the country is one of the factors one would look for investment purposes. It has adverse effects politically, as these perpetrators who have the means may infiltrate politicians, executives and government servants in covering-up their activities. It may have a negative influence amongst the youth of the country as they may be recruited or forced to join these gang members or syndicates. The Bill was intended to strengthen POCA 1959 which was considered to be obsolete and no longer relevant in keeping up with current time and present technology. Hence after extensive debate in the Dewan Rakyat, Parliament decided to:

> ... seterusnya untuk memastikan undang-undang ini adalah lebih efektif dalam pembenteraskan jenayah, maka undang-undang ini akan dipinda di bawah perkara 149 Perlembagaan Persekutuan. Justeru fasal 23 dibuat bagi memperkenalkan bahagian baharu IVA iaitu untuk mengadakan perintah tahanan bagi tempoh tidak melebihi 2 tahun pada satu-satu masa selain daripada perintah pengawasan yang sedia ada.

[250] Section 15A of the POCA was referred to, by the Minister in his speech which subsequently was renumbered as s 15B in the amendment of 2017 which took effect on 15 December 2017 and has its effect as follows:

> Manakala ... mengenai pengenalan seksyen baru 15A iaitu *tiada semakan kehakiman boleh dibuat terhadap keputusan yang dibuat oleh Lembaga Pencegahan Jenayah kecuali mengenai pematuhan kepada prosedur yang ditetapkan*.

[251] Further in the speech by the Deputy Minister on 10 October 2013 as reported, recorded in the Hansard of the Dewan Rakyat at p 59 he said that:

> ... orang tahanan mempunyai hak untuk permohonan habeas corpus terhadap perintah tahanan yang dibuat oleh Lembaga atau membuat semakan kehakiman terhadap perintah pengawasan yang dikeluarkan oleh Lembaga. Di dalam permohonan ini, suspek hanya boleh mempertikaikan mengenai ketidak patuhan prosedur. *Mahkamah tidak boleh mempertikaikan keputusan Lembaga berkaitan perintah tahanan atau perintah kawasan kecuali atas ketidak patuhan prosedur. Ini kerana Lembaga telah berpuas hati terhadap kepentingan keselamatan awam atau pencegah jenayah. Perkara ini adalah terletak di tangan eksekutif.*

[252] Whether the facts upon which the order for detention is to be based is sufficient or relevant, is not to be questioned in any court of law as that is a policy decision within the province and discretion of the Executive. One cannot assume that the powers conferred upon the Executive by statute will be abused (refer to Lord Atkinson in *R v Halliday* [1917] AC 260).

[253] These cases under POCA essentially relate to national security dealing with preventive laws and only those responsible shall be the judge of what national security is and what it requires. It is undesirable for a judge in a court of law to deliberate on matters of national security and to have the subject of evidence to be discussed in public. It deals with preventive justice and it 'proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof' (*R v Halliday*).

[254] Apart from referring to the Hansard, the intention of Parliament in introducing the POCA Bill must also be gathered from the wordings of the ouster clause provision. In the language of s 15B of the POCA, it is clear and explicit in excluding judicial review by the court of any decision of the Chairman or Deputy Chairman under the Act save and except on grounds of procedural non-compliance, hence there is indeed no ambiguity as to the intention of Parliament that the said provision is conclusive on the exclusion of judicial review.

[255] Guided by the consistent judgments of this court in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; [1975] 1 LNS 90, *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105, *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81; [2003] 2 MLRA 399, *Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320; [2005] 4 CLJ 445, *Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors* [2020] 1 MLJ 351; [2020] 1 CLJ 747, *Hemanathan a/l Kunjraman v Menteri Dalam Negeri, Malaysia dan tiga lagi* 05(HC)-172–07 of 2019 (unreported) the respondents submitted that the contention of the appellants that s 15B of the POCA is unconstitutional is without merits. The aforesaid decisions of the Federal Court dealt with the issue of the constitutionality of ouster clauses similar to s 15B of the POCA and it has been consistently established by this court through those cases that the ouster clauses are not unconstitutional.

[256] There is a presumption of constitutionality in every legislation passed by Parliament. The burden to prove otherwise, lies on the party who present the challenge (refer to *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; [1976] 1 LNS 180, *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566; [1994] 1 LNS 208). This presumption of constitutionality issue is addressed at paras 68–74 of this judgment.

[257] The respondent submitted that the trilogy of cases, *Semenyih Jaya*, *Sivarasa Rasiah* and *Indira Ghandi* referred to by the appellant can be distinguished on its facts and issues involved and hence cannot be held in

support of the contention by the appellants.

[258] Therefore s 15B of the POCA is constitutional and for the sixth appellant, Nivesh Nair a/l Mohan, he failed to raise any contravention of any procedural requirements.

SUBMISSION BY AMICUS CURIAE

[259] It has been canvassed at great length before us by both counsels acting as amicus curiae, that the ouster clause, s 15B of the POCA is unconstitutional in light of the trilogy of the Federal Court decisions of:

(a) *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507;

(b) *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; and

(c) *Indira Ghandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals.*

Both counsels acting as amicus curiae support the stand by counsels of the appellants as to the issue of constitutionality of s 15B(1) of the POCA.

[260] Our courts had always assumed jurisdiction to review decision even though there is an ouster clause and that the Federal Court decision in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105 is no longer good law and ought to be given a burial.

[261] The Federal Court in *Semenyih Jaya* gave substantive effect to the 'basic structure doctrine'. The decisions of the Federal Court in *Indira Ghandhi*, *Semenyih Jaya* and also *Sivarasa Rasiah* emphasised that the basic structure components (of which judicial review was integral) are sacrosanct and inviolate and could not be amended by recourse to art 159(1) of the FC which reads:

> 159 Amendment of the Constitution
>
> (1) Subject to the following provisions of this Article and to Article 161E the provisions of this Constitution may be amended by federal law.

[262] Dato' Shad Saleem Faruqi said in his article 'Ouster Clause: a constitutional perspective' that, it is for the courts and not Parliament to determine whether a law is arbitrary, unfair or unreasonable (*Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166 and *Datuk Haji Harun vin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155). In our country, Parliament is not

supreme and the power of judicial review is an essential basic feature of our FC. There are substantive as well as procedural limits on its powers.

[263] Courts can prevent Parliament from destroying the 'basic structure' of the FC on the basis of the trilogy of cases. It is admitted that the 'basic structure' is not explicated anywhere in the FC but a mere constitutional doctrine that has taken roots from India and adopted in Malaysia's jurisprudence by *Sivarasa Rasiah* and *Semenyih Jaya*. In embracing the basic structure doctrine it is impossible to argue that 'law' in art 5(1) is whatever Parliament conceives it to be. The basic structure principle will be more consistent if we leave the door open for judicial review whenever an unreasonable, harsh, oppressive, in breach of natural justice or clear bad faith of laws is promulgated by Parliament. The concept of 'law' in our FC, especially arts 5, 8, 10, 13 and 160(2) does not envisage a law that is unjust, arbitrary, unreasonable, oppressive, or disproportionate (see *Alma Nudo Atenza*).

[264] The substantive as well as the procedural content of all of our laws are subjected by the guarantee of fundamental rights in arts 5–13 of the FC with particular reference to the guarantee of due process in art 5 and equality in art 8. When interpreting laws, it is incumbent upon the courts to ensure that no law transgresses the limits of any of the provisions of the FC, especially the provisions on human rights.

[265] Judges are under an oath to preserve, protect and defend the FC. The duty which is part of the judicial oath in the Sixth Schedule of the FC cannot be diluted either by ordinary legislation or by any constitutional amendment.

[266] The overriding powers of art 149 are confined to matters in arts 5, 9, 10 and 13. It cannot encroach on the ideals and principles of art 121. Laws enacted under art 149 which purports to oust the jurisdiction of the courts to perform judicial review is unconstitutional by virtue of arts 4(1) and 121(1) of the FC.

[267] *Semenyih Jaya* has laid the foundation that the judicial function is part of the basic structure of the FC. Ouster clauses which strip the courts of their supervisory judicial function to examine whether a public body has acted unconstitutionally should be declared to be unconstitutional despite it being explicitly worded ousting judicial review.

OUR DECISION

Approach in the determination of the constitutionality of s 15B of the POCA

[268] The Supreme Court in *Theresa Lim Chin Chin & Ors v Inspector General*

of Police [1988] 1 MLJ 293 provides a guidance in dealing with the determination of the legality and constitutionality of any impugned provision, is to take the broad and practical approach, namely, to see *the scheme of the impugned legislation, POCA.* We are also guided by the clear provisions of the FC in relation to the subject matter (in our present context, preventive detention).

[269] Therefore, in line with this approach in dealing with the issue at hand, (namely whether s 15B of the POCA which purports to limit the exercise of judicial power is ultra vires art 121(1) of the FC and therefore unconstitutional,) in this judgment we will address the relevant provisions of POCA and the FC applicable to the present challenge, namely, s 15B of the POCA and arts 4(1), 121(1), 149. We will also address the doctrine of separation of powers as it has been raised by the appellant.

[270] However, before we proceed to address the constitutionality and validity of the impugned provisions, it is pertinent to understand the historical perspective and intention of the framers and the founding fathers of the FC in the drafting of the relevant articles in the FC, namely on powers of the court, vis a vis on judicial review and laws on preventive detention. Of significance is the role played by the Reid Commission which was tasked with the drafting of the FC.

Reid Commission

[271] When the Reid Commission was established, they recognised what was already inherent in the judicial set up then, that the jurisdiction and powers conferred onto a court were matters within the legislative powers of the Federation, subject to the express terms of the Federation Agreement. The Federation Agreement provided for a Supreme Court which consisted of a High Court and Court of Appeal. The scope and extent of jurisdiction and powers of the courts were determined by federal law. The Supreme Court's jurisdiction then, was expressly conferred by the principal instrument. The Commission did not see it necessary to propose any considerable changes in such arrangement. This is evident in cll 14(1) and (3), and 15 of the Malayan Union Order in Council 1946 (at 31 R(A)BOA). Identical arrangement was adopted and followed in cl 77(1), (2) and (5) of the Federation of Malaya Agreement 1948 (at 33–34 R(A)BOA). This distinctive feature was consistently adopted and manifested in arts 114(4), 118, 119(2), 122, 123, 124(1) and (2) of the draft Constitution (at 14–17 R(A)BOA). These same clauses in the draft Constitution were adopted into the Constitutional Proposals for the Federation of Malaya then, where for the very first time, art 121 made mention of the vesting of judicial power of the Federation as reposed in a Supreme Court and such inferior courts as may be provided by federal law.

A Article 121 as was proposed in the Constitutional Proposals for the Federation of Malaya then was officially adopted in the Constitution of the Federation of Malaya via a Government Gazette. When Malaysia was formed, The Malaysia Act (No 26 of 1963) amended art 121 of the 1957 Constitution to establish three High Courts. The report of the Inter-Governmental Committee 1962 B provides that each of the High Courts should have original jurisdiction and such appellate and revisional jurisdiction as may be provided by federal law.

[272] Evidently, the conferment of courts' jurisdiction and powers by federal law, is entrenched in our constitutional history, so much so that it was accepted C as an unquestionable fact by the Reid Commission. Acceptance of this fact was fortified by insertion of cl 17 'Courts and Jurisdiction' in the division of various powers between the Federal and State government during the drafting stage (41st Meeting of the Commission on 5 October 1956 (35 R(A)BOA).

D

[273] The Reid Commission did not consider the division of various three branches of powers to be constitutionally contrary to the doctrine of separation of powers. The Commission had addressed and considered at length during the drafting process, any possible potential discordance between this arrangement E and the doctrine of separation of powers. It was originally proposed by Sir Ivor Jennings for the tentative draft provisions on 'Fundamental Liberties'. Of significance to those proposed tentative provisions which are relevant for present purpose were art 1 'The Rule of Law', art 2 'Enforcement of the Rule of Law' and art 3 'Liberties of the Person' (CO 889/2 at 36–37 R(A)BOA). In F the 'Comments on the Draft' (CO 889/2 at 38–39 R(A)BOA), Sir Ivor Jennings explained that the provision for enforcement by way of judicial review and habeas corpus was meant to be extended to the whole Constitution and not merely to the Chapter on Fundamental Liberties.

G **[274]** The Commission was clear on the issue of preventive detention and Emergency provisions, that they should be treated narrowly from the general remedies proposed for the enforcement of liberty of the person. Question were raised on the potential invalidation of an otherwise valid statutory ouster clauses in the seemingly absolute terms that it was drafted. After much H deliberation and consultation with London experts it was finally decided that it was impracticable to provide the limits of the Constitution for all possible contingencies. It is considered that sufficient remedies can best be provided by ordinary law. As to the type and extent of remedy available is a matter for the Legislature to decide.

I

[275] Thus, it was decided by the Reid Commission that federal law may prescribe what the Legislature considers as 'sufficient remedy' to meet the demand of the circumstances. These provisions were formulated in such a manner after numerous discussions, meetings and mature consideration

between the committees in the Reid Commission.

[276] It is to be observed that arts 149 (laws against subversion, organised violence and acts prejudicial to public order), 150 (laws on the proclamation of emergency) and 151 (restrictions on preventive detainees) were specially drafted and provided in the FC as separate and distinct provisions from Part II of the FC under 'Special Powers against subversion, organised violence, and acts and crimes prejudicial to the public and emergency powers'. In this regard, it is relevant to refer to the Report of the Federation of Malaya Constitutional Commission by the Reid Commission in 1957 which succinctly explained the powers accorded to Parliament to enact laws in relation to preventive legislations, at p 74 para 172 and p 75 at para 174 which stated:

> 172. Neither the existence of fundamental rights nor the division of powers between the Federation and the States ought to be permitted to imperil the safety of the State or the preservation of a democratic way of life. The Federation must have adequate power in the last resort to protect these essential national interests. But in our opinion infringement of fundamental rights or of State rights is only justified to such an extent as may be necessary to meet any particular danger which threatens the nation.
>
> ...
>
> 174. To deal any further attempt by any substantial body of persons to organise violence against persons or property by a majority we recommend that *parliament should be authorised to enact provisions design for that purpose notwithstanding that such provisions may involve infringements of fundamental rights or State rights.*

[277] Such is the brief factual historical background as to how the provision of art 121 came into being into our FC and how the provisions on preventive detention and remedies were crafted in our Legislature. A constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles that shaped its structure into what it is today.

[278] We will now address the four points raised by the appellants' counsel in the course of their submission in mounting the challenge against s 15B of the POCA.

Point (i): Whether s 15B of the POCA which was enacted under art 149 ousts jurisdiction of the courts to exercise judicial review is unconstitutional by virtue of art 4(1) of the FC

Section 15B of the POCA

[279] Originally, POCA was an ordinary legislation applicable only to West Malaysia. By virtue of the Prevention of Crime (Amendment and Extension)

Act 2014, POCA was made a law pursuant to art 149 of the FC and applicable throughout Malaysia. s 15B of POCA was inserted via Act A1459 in 2014 and further amended via Act A1484 in 2015. Act A1484 inserted a new paragraph to clarify that judicial review includes proceedings instituted by way of a writ of habeas corpus.

[280] The impugned provision limits judicial review and challenge of the Board's decision to one of procedural non-compliance only. It is not a complete ouster clause. The impugned provision reads:

> 15B Judicial Review of act of decision of Board
>
> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act, except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> (2) In this Act, 'judicial review' includes proceedings instituted by way of —
>
> (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
>
> (b) an application for a declaration or injunction;
>
> (ba) a writ of habeas corpus;
>
> (c) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Board in accordance with this Act.

[281] The courts derive its statutory basis for judicial review from s 25(2) read with para 1 of the Courts of Judicature Act 1964 ('the CJA') which states:

> (a) the High Court is conferred with additional powers set out in the Schedule to the Act; and
>
> (b) such additional powers shall be exercised *in accordance with any written law or rules of court* relating to the same.

Paragraph 1 of the Schedule to the CJA gives power to the High Court to issue to any person or authority, directions, orders or writs, including habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others for the enforcement of the rights conferred by Part II of the FC or for any purpose.

[282] The prerogative powers exercised by the courts is provided by O 53 of the Rules of Court 2012 ('the ROC'). These prerogative powers are issued in judicial review proceedings under O 53 r 1(1) of the ROC. O 53 r 2(2), O 53 r 5(1) and O 53 r 6 of the ROC also allow for declaration, injunction and damages to be claimed by the applicant as well as to seek for discovery and

interrogatories in the judicial review application.

Article 4 of the FC and its scope

[283] POCA is a post-Merdeka legislation, hence the challenge as to the validity of its provision is governed by art 4 of the FC. Article 4(1) provides that legislation passed after Merdeka day which is *inconsistent with the FC* shall be void. For clarity, we reproduced art 4(1), which provides:

> This Constitution is the supreme law of the Federation and any *law* passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of this inconsistency be void.

[284] Suffian LP in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112; [1976] 1 MLRA 410, held that we have a written constitution and that Parliament is not supreme. Hence the power of Parliament and the State Legislature is limited by the FC. *Under the FC, written law may be invalidated by the courts on these grounds*:

(a) in the case of Federal written law, because it relates to a matter with respect to which *Parliament has no power to make law*, and in the case of State written law, because it relates to a matter with respect to which *the State Legislature has no power to make law* (see art 74); or

(b) in the case of both Federal and State written law, because it is *inconsistent with the Constitution*, (see art 4(1)); or

(c) in the case of State written law, because it *is inconsistent with Federal law* (see art 75).

There is no restriction on the court's power to declare any law *void* on grounds 2 or 3 and may be exercised by any court in the land and in any proceeding whether it be initiated by the government or an individual. However, the power to declare any law *invalid* on ground (1) is subject to three restrictions as prescribed by the FC in art 4(3) and (4). As grounds (1) and (3) are not relevant to our purpose we will not be addressing the restrictions under those grounds. Our present appeal is concerned with ground (2).

[285] The word 'law' in art 4(1), *means only ordinary laws enacted by Parliament and excludes law to amend the Constitution enacted under art 159*. Only the former must accord with the FC. The latter need not, as to interpret otherwise, would create an absurdity where no change whatsoever can be made to the FC (as per the judgment of Suffian LP in *Phang Chin Hock*).

[286] Similar sentiment was expressed by Raja Azlan Shah FJ in *Loh Kooi Choon* when he remarked that art 4(1) did not apply to the FC itself as the FC

could not be internally inconsistent. 'In the context of art 160(1), 'law' must be taken to mean law made in the exercise of ordinary legislative power and not made in exercise of power of constitutional amendment under art 159(3), with the result that art 4(1) does not affect amendments made under cl (3) of art 159'. Therefore, *Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding the manner and form prescribed by the FC*. Thus, amending legislation is valid even if they are inconsistent with the FC provided there is compliance with the procedures set out in art 159. However, 'that power, though entrusted to Parliament, has been so hedged about with restrictions that its exercise can only be made after mature consideration by Parliament and the content of a larger proportion of its members than the bare majority required for ordinary laws' (as per Raja Azlan Shah FCJ in *Loh Kooi Choon*). Such is the reflection of the provision in the FC as to the flexibility in amending the FC to adapt to the changing values of society, but at the same time it also provides stringent checks to prevent overzealous amendments that undermine the original intention of the framers of the FC.

[287] The appellants argued that s 5B which was enacted pursuant to art 149, which ousts the jurisdiction of the courts to perform judicial review is unconstitutional by virtue of art 4(1) of the FC. That cannot be so, because art 4(1) of the FC will operate in the event s 15B(1) is inconsistent with any constitutional provision that confer it with the legitimacy and force of law. Given that art 149 is the provision which breathes the force of law and legitimacy into section 15B, it cannot be said that the said section is unconstitutional. In this regard, Abdul Rahman Sebli FCJ in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 has succinctly explained the operation of art 4(1) in the majority decision of the said case when the court was dealing with the constitutionality of s 59A of the Immigration Act 1959/63. Of relevance are paras 521 and 522 of the said case:

> [521] Article 4(1) cannot be invoked to strike down just any post-Merdeka law that is inconsistent with just any Article of the Federal Constitution. The Article that the post-Merdeka law is inconsistent with must relate to the relevant subject matter and legislative scheme of the impugned law if the law is to be declared void under art 4(1). To illustrate the point, a law passed by parliament that is inconsistent with the right to life and personal liberty under art 5(1) cannot be declared void under art 4(1) for being inconsistent with the right to free speech and freedom of expression under art 10 (1). If at all it must be declared void, it is to be declared void under art 4(1) for being inconsistent with art 5(1) and not with art 10 (1). That, of course, is to state the obvious. In the present appeal, the appellant's complaint really is about her right to travel under art 5(1) but she has conflated the issue with an alleged breach of her right to freedom of expression under art 10(1).
>
> [522] Likewise, art 4(1) cannot be invoked to strike down any law that is inconsistent with itself as the Article does not operate by itself and on its own. It must be read in conjunction with any other relevant Article of the Federal

Constitution. Thus, if at all section 59A of the Immigration Act is to be declared void, it is void not because it is inconsistent with art 4(1) but because it is inconsistent with art 121(1).

[288] In our present context, apart from the appellants' complaint that s 15B is ultra vires art 121(1) of the FC, the argument also hinges on the issue that s 15B which was enacted by art 149, which ousts the jurisdiction of the courts to perform judicial review is unconstitutional by virtue of art 4(1) of the FC. Article 4(1) cannot be invoked to strike down any law that is inconsistent with itself because the Article does not operate by itself and on its own. It must be read in conjunction with any other relevant Article of the Federal Constitution.

Presumption of constitutionality

[289] The construction of art 4 is premised on the strong presumption of constitutionality of the law (refer to Salleh Abas in *Dato' Yap Peng, Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389; [2006] 2 CLJ 701; *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566; [1994] 1 LNS 208; *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128). Hence the burden lies on the party to prove to the contrary.

[290] The presumption of constitutionality is a manifestation of judicial deference in striking down laws passed by Parliament or to impugn executive action insofar as the exercise of constitutionally derived powers are concerned. The burden lies on the party seeking to impugn the relevant laws as to its constitutional validity.

[291] The rationale for the presumption, which was described as a 'strong' one, was explained in *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 where Hashim Yeop Sani J expressed his views on the issue of constitutional validity of an impugned law at p 131:

> (8) It must be presumed that the legislature understands and correctly appreciates the need of its own people and that its laws are directed to problems made manifests by experience and that its discriminations are based on adequate grounds provided however that while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances on which the classification may be reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of holding that there must be some undisclosed and unknown reasons for the discrimination.

[292] This principle is reflected by MP Jain in his book *Indian Constitutional Law* at p 1641:

> The Courts generally lean towards the constitutionality of a statute upon the premise that a legislature appreciates and understands the needs of the people, that it knows what is good or bad for them, that the laws it enacts are directed to problems which are made manifest by experience, that the elected representatives in a legislature enact laws which they consider to be reasonable for the purposes for which these laws are enacted and that a legislature would not deliberately flout a constitutional safeguard or right. *The legislature composed as it is of elected representatives of the people and what is good or bad for them and that a Court cannot sit in judgment over the wisdom of the legislature.* Therefore, usually, the presumption is in favour of the constitutionality of the statute, and the onus to prove that it is unconstitutional lies upon the person who challenges it.

[293] This court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257 held that a court should presumed the constitutionality of any legislatrure (when it is called upon to decide on the constitutionality of a particular law challenged as being discriminatory and violative of the equal protection of the laws) and derived support for such proposition from the Supreme Court of India in *Shri Ram Krishna Dalmia & Ors v Shri Justice SR Tendolkar & Ors* AIR 1958 SC 538 when it held that:

> 1. ...
> 2. ...
> 3. It must be presumed that the legislature understands and correctly appreciates the needs of its own people, that the laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.
> 4. The legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.
> 5. ...
> 6. ...

[294] Azahar Mohamed CJM in delivering the majority judgment, in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 (*Letitia Bosman*) held that:

> no 3 and 4 (as stated in *Shri Ram Krishna Dalmia & Ors v Shri Justice SR Tendolkar & Ors*) is of critical importance ... This is sometimes described as judicial deference that the Court should accord to the judgment of the democratically elected legislature on matters that is placed within the domain of the legislature. To be more precise, *legislative decisions are entitled to an appropriate measure of deference and respect. It basically means courts attach proper weight to the views and policies adopted by parliament.*

His Lordship sets out the cases relating to judicial deference to constitutionality of laws enacted by Parliament and the principles relating therein, in which His Lordship referred to *De Smith's Judicial Review* at pp 11-004 of which two points stands out:

> first it is elementary point that judicial deference is not the same as non-justifiability. As we have seen earlier at [17], in accordance with the supremacy clause, courts have a vital role to play in determining the laws passed by parliament is consistent with the FC. For instance, where a matter is clearly unlawful; the question of judicial deference 'simply does not arise', and the court will so decide … secondly, while it is one thing to say that court will give weight to the decision of Parliament, it is quite another to say Parliament decision may not be scrutinised by the court at all. In this context, I entirely agree with the observation of Justice Mc Laclin of the Supreme Court of Canada in *RJR Mac Donald v Att-Gen (Canada)* [1995] 3 SCR 199 on the limits of judicial defence:
>
> > care must be taken not to extend the notion of deference too far … Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the view that the problem is so serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and nation is founded.

[295] The Court of Appeal of Singapore in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410; [1998] SGCA 37 (citing the Malaysian case of *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128) dealt with the manner in dealing with the presumption on the constitutionality of an impugned statute:

> *[T]he first duty of the court which is really a rule of common sense is to examine the purpose and policy of the statute … In its approach to the problem the court ought, prima facie, to lean in favour of constitutionality and should support the legislation if it is possible to do so on any reasonable ground* and it is for the party who attacks the validity of the legislation to place all materials before the court to show either the enactment or the exercise of the power under it is arbitrary and unsupportable.

[296] Coming back to the purpose and the policy of POCA, as can be discerned from the Hansard, it is to address the worrying rise in the crime index, particularly in organised crimes or crimes by a substantial body of persons (refer to paras 248 and 249 of this judgment), which posed an adverse effect on the economy of the country. Those were the surrounding circumstances brought to the notice of the court in which the legislation was based and those were the facts which could be conceived existing at the time of legislation. These are reasonable grounds and the appellant has not shown how is POCA or the exercise of the power under it, is arbitrary and unsupportable.

[297] In addition, when deciding on constitutional issues, the context in which such issues arise may make it appropriate for the courts to give particular weight to the views and policies adopted by the Legislature (*Lau Cheong v HKSAR* [2002] 2 HKLRD 612). There may be conflicting decisions to be made by the Executive and the Legislature between the rights of the individual and the demands of society. There may be areas of judgment where the courts will defer on democratic basis, to the considered views of the elected body or persons whose decision is said to be compatible with the needs of society. Thus, a balance must be struck between the needs of the individual and society and 'an inflexible standards must not be imposed on the Legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crimes. It must be remembered that questions of policy remain primarily the responsibility of the Legislature' (*Attorney General of Hong Kong v Lee Kwong-kut; Attorney General of Hong Kong v Lo Chak-man and another* [1993] AC 951).

[298] Hence distilling from the above authorities, the rationale for the presumption of constitutionality is because Parliament is in a better situation to decide on social policy matters rather than the courts. Parliaments represents the will of a democratically elected majority, hence their decision ought to be accepted as legitimate. The courts, which are not elected from the will of the population, are in no position to determine on policy matters, are tasked with resolving of disputes independent from the influence of the media, popular public opinion or pressure groups in the analysis and application of legal rules and principles and interpretation of legal texts.

Article 149 of the FC

[299] The FC empowers Parliament to legislate in respect of preventive detention. 'Preventive detention' has not been defined in the FC or the Interpretation Acts 1948 and 1967. Neither is there a universally accepted definition of preventive detention. As the term connotes, 'preventive detention' is the detention of a person with a view to preventing the person from acting in any manner prejudicial to *public order*, it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crime involving violence that that person should be detained. The word 'public order' is not defined anywhere either, however, a most enlightening overview of the term was extensively undertaken by Abdoolcader J in *Re Applicationof Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83, at pp 86–88:

> Public order ... is less decentralised and narrower concept than the ordinary maintenance of law and order, and maintenance of public order entitles the executive authority to take action to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances. I had occasion

to refer to this distinction in my judgment in *Yeap Hock Seng v The Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279 at pp 282 and 285:

> 'Public order' means the tranquility and security which every person feels under the protection of the law, a breach of which is an invasion of the protection which the law affords (*Board of Commissioners of Peace Officers Annuity and Benefit Fund v Clay* 102 SE 2d575, 577). The American view on 'public order' was well expressed in *Cartewell v Connecticut* [194] 310 US 296, 308 (at page 308) thus:
>
> The offence known as breach of peace embraces a great variety of conduct, destroying or menacing public order and tranquility. It includes not only violent acts and words likely to produce violent in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot....when clear and present danger of riot, disorder, interference with traffic upon public streets or other immediate threat to public safety, peace or order appears, the power of the State to prevent or punish is obvious.
>
> The expression 'public order' is not defined anywhere but danger to human life and safety and the disturbance of public tranquility must necessarily fall within the purview of the expression. It is used in the generic sense and is not necessarily antithetical to disorder, and is wide enough to include considerations of public safety within its signification ...
>
> The Supreme Court of India held in *Kanu Biswas v State of West Bengal AIR* 1972 SC 1656 (at p 1658–9) that the test to be adopted in determining whether an act affects law and order or public order is: Does it lead to disturbance of the current life of the community so as to amount to disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? And again in *Kishori Mohan Bera v State of West Bengal AIR* 1972 SC 1749, 1752 that the true test is not the kind, but the potentiality of the act in question. *Sk. Kedar v State of West Bengal AIR* 1972 SC 1647 decided to the like effect that in relation to public order the determinant factor is one of degree and the extent of the reach of the act upon society and not merely the nature or quality of the act ...

Abdoolcader J referred to the case of *Israil Khan v State of Assam* AIR 1951 Assam 106 which pertained to the prevention of opium smuggling. (The petitioner) therein was ordered to be externed from the province of Assam for a period of 3 years under the Assam Opium Prohibition Act 1947 on the ground that he was a habitual smuggler of opium. He challenged the validity of the legislation in question on the ground that it infringed the provisions of the Constitution of India guaranteeing his fundamental right of freedom of movement. The High Court of Assam held that although the externment provided for, by the Act impaired the right guaranteed to all citizens to move freely throughout the territory of India by art 19(1)(d) of the Indian Constitution, it was not invalid as that right was not absolute and could be curtailed to the extent provided for in art 19(5) which saves any existing or future law imposing reasonable restrictions on the exercise of such right in the interests of the general public.

Further at p 87 paras G-H of the same case:

> Public interest has many facets such as public order, public health, public security or safety or public morals, and the decision in that case confirming the validity of the statute in question must necessarily be grounded on the basis of the maintenance of public order which would allow restrictions to be imposed on the movement of habitual offenders, or persons endangering harmony between different classes or sections of the community and generally for preventing any criminal act.

[300] Preventive detention is a form of crime control mechanism which is fraught with controversy. Despite the many views for and against this approach, it is a mechanism that is well-established and is common to all systems of jurisprudence (*Maung Hia Gyew v Commissioner* 1948 Burma Law Reps 764 at p 766 in Alan M Dershowitz, *The Law of Dangerousness: Some fictions about Predictions*, 23 J Legal Educ 24 (1970)).

[301] Unlike the law on detention upon conviction of a crime or detention during investigation of a crime, the laws on preventive detention are in a separate classification altogether from the ordinary criminal laws. As the word 'prevention' assigned to it indicates that the detention is to avoid and prevent the breach of law. This is as opposed to the ordinary detention which is 'reactive', namely after the commission of an offence, or is known as punitive laws. The distinctive feature of the law in preventive detention permits it to be treated separately from the ordinary criminal detention. The nature of this type of law and how it is to be treated is as described by the Supreme Court of India in *Anukul Chandra Pradhan v Union of India* AIR 1997 SC 2814, where Verma CJI stated that:

> However, for the purpose of the present challenge, *it is sufficient to say that preventive detention differs from imprisonment on conviction or during investigation of the crime of an accused which permits separate classification of the detenus under preventive detention.* Preventive detention is to prevent breach of law while imprisonment on conviction or during investigations is subsequent to the commission of the crime. *This distinction permits separate classification of a person subjected to preventive detention.* (Emphasis added.)

Scheme of the POCA

[302] *POCA which relates to preventive detention, and was enacted pursuant to art 149 of the FC, is to be treated separately from the general criminal law of detention promulgated under art 74 of the FC.* POCA is *a federal law*, which provides that any provision in any Act of Parliament whose recital satisfies the same is valid notwithstanding that the provision may be inconsistent with art 5, 9, 10 or 13 of the FC.

[303] In our present appeals, in the context of POCA, Parliament may restrict fundamental rights on grounds of public order and national security premised on art 149(1)(a) and (f) of the FC which provides that:

> 149 Legislation against subversion, action prejudicial to public order, etc.
>
> (1) *If an Act of parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the federation —*
>
> (a) *to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or*
>
> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
>
> (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
>
> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
>
> (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
>
> (f) *which is prejudicial to public order in, or the security of, the federation or any part thereof,*
>
> *any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.* (Emphasis added.)
>
> (2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, ceased to have effect if resolutions are passed by both Houses of parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

[304] The aforesaid article provides that Parliament may legislate in a manner contrary to the fundamental liberties provisions of the FC if Parliament believes that action have been taken or is being threatened to cause any of the circumstances listed in items (a) to (f) of art 149(1). In this respect, it is pertinent to look at the preamble of POCA which states:

> An Act to provide for the more *effectual prevention of crime* throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto.
>
> WHEREAS *action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to a cause, or to cause a substantial number of citizens to fear, organised violence against persons or property.*
>
> AND WHEREAS Parliament considers it necessary to stop such action;

NOW THEREFORE, *pursuant to Article 149 of the Federal Constitution*

IT IS ENACTED by the Parliament of Malaysia as follows: ... (Emphasis added.)

[305] As the preamble of POCA states that it was enacted pursuant to art 149 of the Constitution, it validates laws passed notwithstanding that it is inconsistent with any of the provisions of arts 5, 9, 10, and 13. Of concern are the fundamental liberties provisions of arts 5 and 9. However fundamental liberties although enshrined under the FC, are not absolute and can be taken away by the passing of laws by the Legislature pursuant to art 149. That validly enacted law in our present context is s 15B(1) of the POCA which prohibits judicial review of the Board's decision save and except on procedural non-compliance.

[306] It is to be observed that there is a similarity in the preamble of POCA and the desired objective as expressed in art 149(1), in particular item (a) thereof, namely, 'action has been taken or threatened by a substantial body of persons both inside and outside Malaysia to cause a substantial number of citizens to fear, organised violence against persons or property'.

[307] This is the additional condition which the FC expressly provides for, that must be met before a piece of legislation which limits the rights of a person, may be enacted. Thus, POCA satisfies this condition and it is a special law, of an entirely different legislative regime relating to preventive detention enacted pursuant to art 149 of the FC. The legislative scheme of s 15B of the POCA is to limit the judicial review power of the High Courts to procedural non-compliance by the decision maker.

[308] It was argued by counsel for the appellants that art 149 does not suspend or considered art 4(1) and hence there is nothing in art 149 of the FC that insulates legislation enacted under it from being challenged on its constitutionality under art 4(1) of the FC.

[309] In this regard, it is our view that there is no single provision in the FC that can claim superiority over the other provisions. Article 4(1) provides for a declaratory provision of the FC being the supreme law of the Federation and any legislation passed after Merdeka day *which is inconsistent with the FC* is void. It provides for the challenge on legislative competency and validity and the manner of challenging it. To qualify or suspend the application of arts 4 in 149 would run contrary to the very objective and purpose of art 4, namely, the declaration of constitutional supremacy of the FC. Article 4 cannot be suspended by any other article in the FC. Article 4 is unlike the provisions in arts 5, 9, 10 or 13 which relate to fundamental rights, which can be, and are suspended by art 149. Article 149 therefore stands in equal footing with other

provisions in the FC. Article 149 is the power given to Parliament to enact laws which satisfies the requirement as stated in paras (1)(a)–(f). Article 4(1) is not to operate the way the appellants suggest it to be.

[310] Nevertheless, any law passed under art 149 of the FC is like any other laws passed under art 74 or 76 in respect of any challenge of constitutionality. This is because of the doctrine of constitutional supremacy provided under art 4 of the FC (*Ah Thian v Government of Malaysia*). In the present appeal, POCA is legislated under art 149 and it is federal law, which validity is subject to challenge under art 4, namely it is liable to be struck out if it is inconsistent with the provision of the FC.

[311] In the present appeal, an examination of the scheme of the POCA allows the Board to:

(a) direct a registration of a person who is believed upon reasonable grounds to be a member of the registrable categories as prescribed in the First Schedule, if it is considered in the interest of public order or security to do so (s 12 of the POCA);

(b) make an order for police supervision if the Board is satisfied that it is necessary that control and supervision be exercised over the registered person with certain restrictions and conditions (s 15of the POCA);

(c) make a detention order over the registered person if the Board is satisfied that such detention is necessary in the interest of public order, public security or prevention of crime (s 19A of the POCA);

(d) make any other orders — for the removal of name from the Register (s 14 of the POCA), for suspension of or revocation of detention order (s 19C of the POCA), for revocation of any supervision order (s 19C(3)), for renewal of detention order (s 19H(2), for removal of a detainee from any place of detention to another place of detention.

[312] Hence from the scheme of POCA, it is a special law where its underlying purpose or object bear significance in the interpretation of preventive laws promulgated pursuant to art 149. Article 149 affirms the validity of legislation enacted against subversion, action prejudicial to public order and the like. From the provisions of the FC and POCA the decision-makers in the substantive or factual matter of preventive detention, are the Executive. In this respect, art 151(3) of the FC is significant in which it provides that:

> This article does not require any authority to disclose facts whose disclosure would in its opinion be against *national interest*.

[313] Further, the provision of s 21Aof the POCA (which is derived from art

A 151(3) of the FC) states:

> Nothing in this Act ... shall require the Board, any member of the Board, any Inquiry Officer or any public servant to disclose facts or to produce documents which he considers —
>
> B (a) to be against the *public interest* to disclose or produce; or
>
> (b) would compromise the protection of a witness, or his family or associates.

[314] From the aforesaid, it appears that ss 15B and 21A of the POCA were C crafted with art 151(3) of the FC in mind. Both ss 15B and 21A of POCA were enacted to give effect to the purpose and objective of POCA, arts 149 and 151(3) of the FC. Therefore, as ss 15B and 21A of POCA emanated from art 149 of the FC and buttressed by art 151(3) of the same, how could s 15B not be constitutional? s 15B was enacted to amplify the emphasis on national D interest under art 151(3) of the FC. It is to be noted that art 151(3) of the FC was never challenged by the appellants.

[315] From the scheme of art 151(3) of the FC, and s 21A of POCA the authority is bound not to disclose facts which would be against national E interest. The authority to decide what is public interest in our present appeal, would be the Executive who has the expertise.

[316] Therefore, in approaching the present appeals, the court must be F guided by the clear words of the FC and POCA, in this case arts 149, 151(3), s 15B and s 21A of the POCA. We have discussed in the preceding paras 303–307 of this judgment, that it is within the province of the Legislature in accordance to the powers given to it under art 149 of the FC to enact the impugned provision to address the mischief of national security. It is also G within the realm of the Legislature's power to enact the impugned provisions which provides for limited judicial review.

[317] In this regard we are reminded by the words of Lamin bin Mohd Yunus, PCA in *Ketua Polis Negara & Anor v Gan Bee Huat and other* H *appeals* [1998] 3 MLJ 86, where he referred to the judgment of Tun Suffian LP when His Lordship delivered the judgment of the Federal Court in *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157 at p 159 on the constitutionality of the Internal Security Act 1960:

> I The ISA is legislation against subversion expressly authorised by art 149 of the Constitution. Mr Karpal Singh conceded that the Act was constitutional; that being so we cannot see how it can be said that the impugned section is invalid as being contrary to art 5(1); because the article itself expressly provides that any provision of law enacted under the article is valid 'notwithstanding that it is inconsistent with art 5'.

Hence, one can see the stature that is being given to legislations promulgated under art 149 in that, laws enacted under the said article is constitutional despite it being inconsistent with certain articles of the FC.

[318] In the context of the present appeals, the impugned law is constitutional as art 149 (to be read with art 151(3)), authorised it. The task of the courts, as provided in art 121(1) is to give full effect to what is provided by federal law, in this case, s 15B of the POCA which allows for limited judicial review (art 121(1) is being addressed at para 328 onwards of this judgment)

[319] Hence, premised on the aforesaid, it cannot be said that by limiting the courts' power in s 15B of the POCA, the Legislature/Parliament has encroached on the jurisdiction of the courts. It is the Legislature/Parliament that confer the court that jurisdiction and power. As such, there is no usurpation of judicial powers by the Legislature. The courts exercises its powers as provided by POCA, a federal law, which is precisely what art 121(1) of the FC provides.

[320] In addition, premised on *Ah Thian v Government of Malaysia,* and the fact that the impugned legislation is a federal law, it is incumbent on the appellant to show that the impugned legislation is inconsistent with the provision of the FC (premised on art 4(1) of the FC). The appellants in their submissions did not state under which provision of the FC is the impugned section inconsistent with. The submissions merely state that it is unconstitutional by virtue of art 4(1) of the FC. As we said in the preceding paras 287, 288, 308 and 309, that is not how art 4(1) operates.

[321] Therefore, in light of the foregoing, that:

(a) the FC under art 149 empowers Parliament to legislate POCA of which s 15B is part of it;

(b) art 149 stands on equal footing with the other provisions of the FC;

(c) art 4 relates to declaratory provision that the FC is the supreme law of the land and provides for instances where legislations enacted by Parliament may be challenged. Article 4(1) will operate if s 15B(1) of the POCA is inconsistent with any constitutional provisions that confers legitimacy and force of law, namely art 149 of the FC; and

(d) art 149 is not inconsistent with art 4(1), as art 149 is an empowering provision to Parliament to legislate laws against subversion and public order, it cannot be said that s 15B of the POCA is inconsistent with art 4(1).

[322] Given the aforesaid, to conclude for point No (i), s 15B which limits judicial review by the courts only on procedural non-compliance is not unconstitutional by virtue of art 4(1) of the FC.

Point (ii): Whether the ouster clause in s 15B of the POCA is an attempt by Parliament to suppress judicial powers given to the courts as provided under art 121(1) of the FC; and

Point (iii): Whether s 15B of the POCA encroaches on judicial power thus breaching the doctrine of the separation of powers between the three branches, namely the Executive, legislative and the judiciary

[323] We will address points (ii) and (iii) together.

Article 121(1) of the FC

[324] It was argued by the appellants that s 15B of the POCA is an attempt by Parliament to suppress judicial powers given to the courts as provided under art 121(1) of the FC.

[325] There is no definition of 'judicial power' in the FC. Griffith CJ of Australia interpreted the phrase in *Huddart, Parker and Co Prop Ltd v Moorehead* [1908] 8 CLR 330 to mean:

> ... the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision ... is called upon to take action.

[326] Abdoolcader SCJ in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 at p 317 (in the majority judgment) broadly defined judicial power as:

> ... the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties. It is virtually impossible to formulate a wholly exhaustive conceptual definition of that term, whether inclusive or exclusive ...

[327] The appellants argued that the limitation of the exercise of judicial power in s 15B(1) of the POCA is ultra vires art 121(1) of the FC. It was argued that such limitation erodes judicial power, which under the FC vests solely in the Judiciary. In our view, it is not so, for the following reasons.

[328] The jurisdictions and powers of the court is constitutionally provided under Part IX of the FC which housed art 121(1) which provides:

121 Judicial power of the Federation

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely-

(a) One in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) One in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) Repealed.

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be *conferred by or under federal law* ...

...

(1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) ... and the Court of Appeal shall have the following jurisdiction, that is to say —

(a) ...

(b) such other jurisdiction as may be *conferred by or under federal law.*

(2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) ..., and the Federal Court shall have the following jurisdiction, that is to say —

(a) ...

(b) such other jurisdiction as may *be conferred by or under federal law*. (Emphasis added.)

[329] As art 121(1) of the FC now stands, 'judicial power' depends on what federal law provides as was elucidated by the judgment of Tun Abdul Hamid Mohammad, PCA (as he then was) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1:

[21] ... *The extent of the powers of the courts depends on what is provided in the Constitution. In the case of the two High Courts, they 'shall have such jurisdiction and powers as may be conferred by or under federal law.*' So, we will have to look at the federal law to know the jurisdiction and powers of the courts. (In the case of the Federal Court and the Court of Appeal, part of their jurisdiction is specifically provided in the Constitution itself — see art 121(1B) and (2) respectively).

[22] So, even *if we say that judicial power still vests in the courts, in law the nature and extent of the power depends on what the Constitution provides,* not what some political thinkers think 'judicial power' is ... That is the limit of judicial power of the court imposed by law ...

[330] Articles 121(1), 121(1B) and 121(2) use the word 'conferred by federal law'. The term 'federal law' is defined in art 160 of the FC to mean:

(a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and

(b) any Act of Parliament.

Those are the sources of 'judicial power' as can be found in the provisions of the FC, namely, judicial power is derived from federal law.

[331] However this court in *Semenyih Jaya* said that art 121(1) of the FC merely suggests the sources of power in which the High Courts derived its powers and jurisdiction. It had embarked on defining judicial power under art 121(1) to extend well beyond than what is stated in the federal laws and held that:

> [69] The narrow compass within which the Federal Court in *Kok Wah Kuan* above approached art 121(1) of the Federal Constitution suggests that the provision merely identifies the sources from which the High Courts derive their jurisdiction, namely from federal law. *Whilst it is correct to say that the powers of the High Courts to adjudicate legal disputes are those which have been conferred by federal laws, in our view the legal implication of art 121(1) extends well beyond that* ...

[332] A perusal of the reasoning in *Semenyih Jaya* on the meaning of judicial power reveals that it substantially hinges on the application of the concept of basic structure which was introduced in *Sivarasa Rasiah* when the Federal Court stated that:

> [78] In the past, the apex court has consistently rejected Parliamentary supremacy in giving its continuing endorsement and faint praise to the Federal Court decision in *Ah Thian v Government of Malaysia* ... in which Tun Suffian ... said that:
>
> > The doctrine of Parliamentary supremacy does not apply in Malaysia. Here we have a written constitution. The power of Parliament and the state legislation in Malaysia is limited by the Constitution and they cannot make any new law as they please.
>
> [79] And again in another case, that of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* ... the Federal Court ... said at p 342 that:
>
> > ... Further *it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric*. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Suffice to say that the rights guaranteed by part II which are enforceable in the courts from part of the basic structure of the federal Constitution ...

A

[80] *Sivarasa*made a clear departure from an earlier Federal Court decision of *Loh Kooi Choon* ... which in effect concluded that as long as an amendment to the Federal Constitution is effected in the manner required by art 159 of the Federal Constitution, that amendment was effective regardless of its effect insofar as the basic structure of the Constitution is concerned.

B

[81] Thus, *Sivarasa* made a frontal attack on *Loh Kooi Choon* where the Federal Court in *Sivarasa* tersely observed that:

> ... the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that parliament cannot enact laws (including amending the Constitution) that violate the basic structure. (Emphasis added.)
>
> ...
>
> [114] Our Federal Constitution affirms the polemic that judicial power is exercisable by the judges sitting in a court of law; and that judicial process is administered by them and no other.'

C

D

(Paragraphs 396–421 of this judgment address the applicability of the basic structure concept to our present appeals.)

[333] Be that as it may, whatever has been said of art 121(1) by the minority judgment of Richard Malanjun FCJ in *Kok Wah Kuan*, the same has not been struck down as being unconstitutional. Hence it is still valid and good law and it should be construed in accordance to what it says, given the principles of statutory interpretation and clear constitutional provision, as to do otherwise, would in the words of Abdoolcader SCJ in *Television Broadcasts & Ors v Seremban Video Centre Sdn Bhd* [1985] 1 MLJ 171, 'amount to unwarranted transgression into the legislative domain'.

E

F

[334] The various interpretation of the meaning of judicial power is found in the lengthy judgment of the majority and the minority in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561. We feel it futile to reproduce or repeat the line of authorities on the meaning of judicial power for obviously, it is no easy feat to attempt a formulation of a wholly exhaustive conceptual definition of this terminology. The glaring difference lies between the idealist and the pragmatist in their approach to defining judicial power.

G

H

[335] This court in *Semenyih Jaya* was of the view that the 1988 Amendment had the effect of undermining the judicial power of the Judiciary and impinges on the features of the FC, namely the doctrine of separation of powers and the independence of the Judiciary. It further stated that 'with the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament

I

A became sovereign. The result was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in art 4(1)'.

[336] However, we are of the view that the 1988 amendment to art 121(1) of the FC does not oust away judicial power of the courts. The deletion of the phrase 'the judicial power of the Federation shall be vested in' does not have the effect of taking away the inherent judicial power from courts. Where there is a clear case of injustice being committed, the court is conferred with inherent powers under r 137 of the Rules of the Federal Court 1995 to hear any application or to make any order as may be necessary to prevent injustice (*Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61). There is also O 92 r 4 of the Rules of Court 2012 (before 2012, it was Rules of High Court 1980) which according to Edgar Joseph Jr FCJ in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 at p 238 said:

> In my view, O 92 r 4 is a unique rule of court for while it neither defines nor gives jurisdiction, yet it serves as a reminder and confirmation — lest we forget — of the common law powers of the court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the court.

Order 92 r 4 of the Rules of Court 2012 reads:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[337] This court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 was of the view that the High Courts would still have the inherent powers similar to that of the High Courts in the United Kingdom even in the absence of the said order. Edgar Joseph Jr, FJ's reasoning is that supervisory jurisdiction of the courts is the creature of common law and such inherent power may be extended through judicial development and legislative intervention as for instance para 1 of the Schedule read with s 25 of the Courts of Judicature Act 1964.

[338] Although no explicit reference was made to the amended art 121(1) it is implicit from the judgment that the courts retain its inherent power notwithstanding the amendment.

[339] In *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 the Chief Judge for Sabah and Sarawak in a majority judgment, (which cited *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61 as support) expressed his view that the inherent power of the Federal Court has been preserved, firstly, by r 137 of the

Rules of the Federal Court 1995 and secondly, by the application of the common law principle of inherent power of the court as envisaged by s 3(1)(a) of the Civil Law Act 1956 which reads:

> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;

[340] Despite the provisions of s 25 Courts of the Judicature Act 1964, O 92 r 4 of the Rules of Court 2012 and r 137 of the Rules of Federal Court 1995, one must never lose sight of art 4(1) of the FC which provides that it is FC which is the supreme law of the Federation (*Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201). In other words, in our present appeals, such *general* inherent powers as stipulated under s 25 Courts of Judicature Act, O 92 r 4 of the Rules of Court 2012 and r 137 of the Rules of Federal Court 1995 are subjected to art 4(1) of the FC, which is the supreme law of the Federation and s 15(1) of POCA which is a *special law* enacted under art 149.

[341] In addition, from the position taken by the Federal Court in cases such as *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105 and *R Rama Chandran v The Industrial Court of Malaysia & Anor*, which essentially stated that 'appellate review jurisdiction is solely a creature of statute while supervisory review jurisdiction is the creature of the common law and is available in the exercise of the courts' inherent jurisdiction but, ... its extent may be determined not merely by judicial development *but also by legislative intervention* ... Parliament may legislate on the extent and scope of judicial review in particular situations ...' which means that *supervisory review jurisdiction can be excluded by statutory legislation if the words are unmistakably explicit*. Hence we have the provision of s 15B(1) of the POCA which explicitly excluded judicial review on procedural non-compliance.

[342] The court's function as a court of law is to decide cases that came before it in accordance with federal law which is enforced at the material time. In this respect, art 121(1) of the FC is clear, in that it provides that *courts are established by law* (including the FC) and *court's jurisdiction and the source of powers are derived from federal law. 'Federal law' is defined by art 160(2) to mean any Act of Parliament*. Courts vis a vis judges do not derive their power in a vacuum and neither can they create jurisdiction for themselves. This is for Parliament to decide via the passing of federal law when art 121(1) states that '... and the High Courts and inferior courts shall have jurisdiction and powers as may *be conferred by or under federal law*'. We had established that Parliament

A has the legislative power to enact federal law in relation to preventive detention under art 149. Section 15B of the POCA is federal law, and that is where the courts derived its power in judicial review under POCA. This is premised on art 121(1). The courts' duty is to interpret what is provided in s 15B.The powers of the courts cannot be derived from some amorphous concepts or
B doctrines, more so when such doctrines or concepts took root from a foreign country. Hence, it is incorrect to state that s 15B is an attempt by Parliament to suppress constitutional powers given to the courts as provided under art 121(1).

C

[343] The exercise of judicial power does not begin until and unless the court is called upon to do so. Therefore the substratum of laws must first exist before judicial authority comes into being. Such power exists because Parliament enact it to be so. Otherwise the question of removing judicial
D authority does not arise.

Separation of powers

[344] This leads us to the point (iii), namely, whether s 15B encroaches on
E power of judicial review of the courts thus breaching the separation of powers between the Executive, legislative and the Judiciary. This proposition by the appellant is grounded on the doctrine of separation of powers and independence of judiciary which are regarded as the basic structure of our FC.

F **[345]** Traditionally, the concept of judicial power encompasses the supervisory jurisdiction of the courts, as a check and balance mechanism in ensuring the Executive and the Legislature act in accordance with law. Hence, the power to exercise judicial review by the courts is crucial.

G **[346]** No doubt, the doctrine of separation of powers and the independence of judiciary are both universal values, sacrosanct in a democratic society. However, we must also be reminded that in the context of our constitutional structure, based on the Westminster model, there are certain overlapping of functions and powers of the three branches of government so as to say there
H exists a lesser degree of separation. Under the Westminster model of government the separation does not fully exists. Although it lends its existence to the three branches, however the ministers are both executives and legislators. Our written FC, have the features of separation of powers, but at the same time, it has features which do not strictly comply with the doctrine. Relevant to this
I issue, Tun Abdul Hamid Mohamad PCA (as he then was) in *Kok Wah Kuan* explained as follows:

> [17] In other words we have our own model. Our Constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies

depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy. The Constitution provides for elections, which is a democratic process. That does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore void.

[347] Richard Malanjum CJ in *JRI Resources*, while acknowledging the non-rigid separation of powers, subscribed to the strict view of separation of powers between the Judiciary on the one hand and the overlapping between the Executive and legislative on the other. In other words, there is no such overlapping between the Judiciary and the other two branches.

[348] Azahar Mohamed FCJ (as he then was) who formed the majority in *JRI Resources* on the other hand acknowledged the overlapping of powers between the three branches. The existence of tribunals by statute exercising quasi-judicial power is an example of the absence of absolute separation of power as alleged. This is what His Lordship stated in *JRI Resources*:

It is also worth emphasising that our Federal Constitution is grounded on the Westminster system of parliamentary government under which the sovereign power of the State is distributed among three branches of government, vis, Legislature, the Executive and the Judiciary ... It has been said that for one branch of the government usurps the rightful authority and power of another is to undermine doctrine of separation of powers. Having said that, I note at the same time that the doctrine recognises that, where necessary, one branch of the government should be allowed to exercise part of the powers of another branch and the delegation of power by one branch of the government to another. This point is made by Professor Dr Shad Saleem Faruqi in Document of Destiny, The Constitution of the Federation of Malaysia, with the necessary emphasis, at p 48:

> It is wrong to suggest that the powers of the state are neatly divisible into three categories. The truth is that each of the three functions of government contains elements of the other two and that any attempt rigidly to define and separate these functions must either fail or cause serious inefficiency in government...Under the conditions prevailing at this time, it would be highly inconvenient and unworkable to insist on a rigorous separation of powers. For example, due to a lack of time and expertise, Parliament is not able to frame each and every law which governs the citizen. Quite often, it delegates its legislative power to members of the Executive who then frame rules and regulations on its behalf. Such framing of legislation by an authority other than Parliament, on parliamentary delegation, is called subsidiary or delegated legislation. It is a power unmistakably legislative (because it relates to the making of laws) yet it is exercised by a delegate belonging to either the Executive or judicial branch ... *Similarly, the courts today have a backlog of cases. If all income tax and industrial*

disputes were to be heard in the first instance by the ordinary courts of the land, the administration of justice will be even slower than it is today and the system may get choked up. Administrative tribunals like income tax tribunals or labour tribunals are created by Parliament to decide on disputes in their specialized fields. Administrative tribunals are mostly composed of legally trained persons who are not judges of the courts, yet they perform a judicial function. They are, therefore, called quasi-judicial bodies-partly judicial, partly administrative …

In commenting on the version of strict of powers by Montesquieu, Professor Dr Shad Saleem Faruqi in his latest book, Our Constitution, published in 2019 explained at p 62, that *'the Executive, legislative and judicial functions are overlapping and cannot be separated in a water-tight way. Nor should they be rigidly separated'*. (Emphasis added.)

[349] Undeniably, we do have administrative tribunals who are not judges of the courts, yet they perform a judicial function. These are tribunals created by Parliament deciding on areas like housing, income tax, consumerism, industrial disputes and these tribunals' powers and jurisdictions are defined by federal law. If we are to apply the argument of the appellant that encroachment on judicial power amounts to breaching the doctrine of separation of powers, these tribunals are equally unconstitutional. However, that cannot be so, simply because in our system of government, the absolute demarcation of what constitutes an encroachment to judicial power is not always easy to draw the line. Nevertheless, our courts have been consistent that there are certain areas which are either non-justiciable or which are not suitable or amenable for the court to adjudicate on. This means, the nature of the subject matter in question shall be one of the determining factors.

[350] Ascertainment of Islamic Law for the purposes of the Islamic financial business is one of the areas as was decided in *JRI Resources*. Other matters which the court is reluctant to delve into, include the power of the state to enter into treaties and conduct of foreign policy, the defence of the realm and the control of the armed forces, the prerogative of mercy, the dissolution of Parliament and the appointment of Ministers. Such powers are governed by broader policy considerations which are more appropriately entrusted to the political branches of government, and which are unsuited to be examined by the courts (*Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443).

[351] In this respect, we find support in *Liyanage and others v The Queen* [1967] 1 AC 259, a case referred to, in *Semenyih Jaya*, *Indira Gandhi* and *JRI Resources*, where Lord Pearce in delivering the judgment of the Privy Council, said that:

Each case must be decided *in the light of its own facts and circumstances, including the*

true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the Judiciary in specific proceedings. It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal.

[352] The appellant relied on the principle of separation of powers that it is the court that carries out the function of judicial review of any decision of the Board, and since that power is taken by the Legislature via s 15B, that particular provision is therefore unconstitutional.

[353] In determining whether there has been an encroachment by the Legislature in enacting the impugned provision, we are guided by the clear provisions of the FC and the provisions of POCA (as per judgment of Suffian LP in *Theresa Lim Chin Chin* at p 295 where in the context of ISA laws) that:

... *we must approach these appeals in the broad principles of the constitutional provisions and also the provisions of the ISA and in particular to those relating to preventive detention*. We accept the approach to the legality and constitutionality of the ISA as so admirably and cogently stated by Lord Diplock in *Teh Cheng Poh v Public Prosecutor*, and that is: we have to be guided by clear words of the Constitution and the statute ...

... The broad and practical approach that we take in this matter is to see *the scheme of the legislation both under the Constitution and the ISA. There can be no doubt that the ISA is a special law, however unpopular it may be, passed under the authority of Article 149.*

[354] Separation of powers is within the system and very much alive. If each branch is conscious and understand their respective role in discharging their role responsibly, there should not be any fear of power abuse or infringement of rights of the citizen. In as much as it is the function of the Judiciary to interpret laws, it is also as much a function of the Legislature to pass laws, so long as it adhere to the manner as stipulated under art 159 of the FC. In *Theresa Lim Chin Chin*, Suffian LP held at p 298 that:

In the circumstances of the case, having regard to the grounds we have set out earlier, the appeals should be dismissed. But we are not unmindful of *our grave responsibility to be between the Executive and citizens. We would like to reiterate that we do not abdicate our function and shy away from our responsibilities*. It would be very much to be regretted and indeed it would be most unfortunate if the results of these appeals were to be understood as an abdication of our duties. This misunderstanding may arise in view of so many recent adverse comments against the Judiciary and the legal system of this country. *The court must be neutral and independent. When the law is clear, we must declare what the law is*.

In a proceeding like the present one where both the legislation and the *executive act under it are challenged, our duties are not to substitute our decision for that of the*

> *Executive. We are only concerned with the procedural aspects of the exercise of the Executive discretion*. We have no interest, nor desire, to embark upon trespassing into the domains of the Legislature or the Executive. In a democratic society in which the government is not absolute but a limited one, *there is a duty on the part of the Executive to act with fairness and follow a fair procedure*. Since in these appeals, the law is clear, despite the fact that it is much criticised both at home and abroad, our decision cannot be otherwise than what we have said earlier. We made this observation because we feel that we owe a duty to the public to put our position on record in view of so many adverse comments made against us.

[355] Hence the test of constitutionality to be devised by the courts in deciding whether an impugned provision is constitutional or not and in determining 'to what extent the doctrine (of separation of powers) applies depends on the provision of the Constitution ... [No] provision of the law may be struck out as unconstitutional if it is not inconsistent with the FC, even though it may be inconsistent with the doctrine. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; [1975] 1 LNS 90 (FC) said:

> The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.

Adopting the principles as aforesaid, by limiting judicial review to procedural non-compliance by virtue of s 15B of the POCA, Parliament did not encroach onto the judicial powers of the court as it is within their power to do so. The court in exercising such powers act according to what is prescribed and limited by POCA, a federal law. Section 15B is thus not inconsistent with art 121(1) of the FC.

[356] We hereby state that we do not find merit on the heavy reliance by the appellants on *Semenyih Jaya* in support of the proposition that limiting of judicial review powers interferes with judicial function thus breaching the doctrine of separation of powers. *Semenyih Jaya* clearly dealt with the powers of assessors who sat with the High Court judge in determining the compensation for the compulsory acquisition of land. That clearly offends the separation of powers as the assessors who are non-judicial bodies exercising judicial function. Thus *Semenyih Jaya* is not applicable to our present case because the exercise of judicial power by virtue of s 15B of the POCA is still with the court and no other body.

[357] Therefore the ouster clause as in s 15B of the POCA does not suppress constitutional powers given to the courts as provided under art 121(1) of the FC. Neither does it encroach on judicial power thus breaching the doctrine of the separation of powers between the three branches, namely the Executive, legislative and the Judiciary. In any event it cannot be said that s 15B of the

POCA is unconstitutional because it breached the doctrine of separation of powers. It is unconstitutional, only if it is inconsistent with any other provision of the FC (refer to art 4(1)).

Ambit of judicial review in s 15B

[358] The House of Lords' decision in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935; [1984] UKHL 9 was referred to by the Supreme Court in *Re Tan Sri Raja Khalid bin Raja Harun Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182, where Lord Scarman who agreed with Lord Diplock in dismissing the appeal on the ground of national security also made clear that:

> the law relating to judicial review has reached the stage where it can be said with confidence that if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power.

The caveat is, if the subject matter is justiciable.

[359] Further, Lord Diplock stated that:

> The reason why the Minister for the Civil Service decided on December 22, 1983 to withdraw this benefit was in the interests of national security. *National security is the responsibility of the Executive government; what action is needed to protect its interest is, as the cases cited by my learned friend, Lord Roskill, establish and common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves*.

[360] In the matters of conflict between the rights of an individual against the interest of the public, the latter takes priority. Lord Roskill in the said case viewed that:

> the conflict between private rights and the rights of the state is not novel either in our political history or in our courts. Historically, at least since 1688, the courts have sought to present a barrier to inordinate claims by the Executive. *But they have also been obliged to recognise that in some fields that barrier must be lowered and that on occasions, albeit with reluctance, the courts must accept that the claims of executive power must take precedence over those of the individual. One such field is that of national security. The courts have long shown themselves sensitive to the assertion by the Executive that considerations of national security must preclude judicial investigation of a particular individual grievance.* But even in that field the courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds. That that principle exists is I think beyond doubt. In a famous passage in *The*

Zamora [1916] 2 AC 77, 107 Lord Parker of Waddington, delivering the opinion of the Judicial Committee said:

> Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

The Judicial Committee were there asserting what I have already sought to say, namely that some matters, of which national security is one, are not amenable to the judicial process ... in *Reg v Secretary of State for Home Affairs, Ex parte Hosenball* [1977] 1 WLR 766 where the Court of Appeal and in particular Lord Denning MR, at p 778, accepted that if the case had been one 'in which the ordinary rules of natural justice were to be observed, some criticism could be directed upon it' but held that the interests of national security must override the appellants' private rights and that where compliance with the requirements of natural justice would itself have revealed that which it was in the interests of national security not to reveal, private rights must yield to the public interest.

[361] This court has consistently held that judicial review on the decision of the tribunals exercising similar functions to the Board should not be questioned except on procedural non compliance. Such discretion in determining the substantive/policy matter by the Board is outside the reach of the courts. Suffian LP in *Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia* [1969] 2 MLJ 129 has the occasion to decide on the similar issue when His Lordship held at p 152 that:

> ... *it is not the court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of fact furnished to him. The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the Executive*. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact. (Emphasis added.)

Further at p 153:

> In any event it is not for the court to judge the vagueness, sufficiency or relevance of the allegations of fact on which the order of detention is based. It is for the Executive to do so.

Of worthy to note is what Gill FCJ said in his judgment at p 154:

> *There is ample authority for the proposition that it is not the function of the court to act as a court of appeal from the discretionary decision of the Cabinet and to inquire into the grounds upon which they came to the belief that it was necessary or desirable in the interests of the security of Malaysia to hold the appellant in detention* (see T*he King v Secretary of State of Home Affairs, Ex parte Lees*). As was stated by Lord Atkinson in

Rex v Halliday, *it must not be assumed that the powers conferred upon the Executive by the statute will be abused*. His Lordship went on to say (at p 275):

> And as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof.

With respect, I agree

Ali FCJ at p 159 said that:

> Lastly, *there is also the appellant's affidavit in which he categorically denies each and every one of the allegations of fact and contends in each case that even if the allegation is true, it cannot constitute a threat to the past or future security of Malaysia. In this connection, I shall be content to say that in habeas corpus proceedings, such as this, the court is not concerned with the truthfulness or otherwise of the allegations because the question whether it is necessary that a person be detained under s 8(1)(a) of the Internal Security Act 1960 is a matter for the personal or subjective satisfaction of the Executive authority*. Accordingly, no consideration can be given to the appellant's denial and no opinion need be expressed on his contentions ... (Emphasis added.)

[362] Allegations of fact in which the order for detention had been based on alleged activities of the detenu and the satisfaction of the Executive being subjective is not open for the court to examine as to the sufficiency of the allegations. Allegations of facts deal with matters within the province of national policy in relation to the security of the nation whereby the subjective satisfaction of the Executive on those allegations cannot be substituted by an objective test in a court of law. The Indian Supreme Court has succinctly expressed its view on this precise issue on the detention order made under s 3 of the Indian Preventive Detention Act in *The State of Bombay v Atma Ram Sridhar Vaidya* AIR 1951 SC 157 where Kania CJ held at p 160 as follows:

> There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If, therefore, the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of mala fides cannot be challenged in a court. *Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the Central Government or the State Government, is ruled out by the wording of the section. It is not open to the court to sit in the place of the Central Government or the State Government and try to determine if it would have come to the same conclusion as the Central Government or the State Government. As has been generally observed, this is a matter for the subjective decision of the government and that cannot be substituted by an objective test in a court of law.*

[363] Although our law differs from that of India as the order of detention to be lawful in India it must be in 'accordance with procedure established by law' as opposed to our law which must be 'in accordance with law', the principle as to judicial review on substantive matters as stated in the aforesaid case is equally applicable to our situation. In fact Gill, FJ in *Karam Singh*, after going through the position in India and our local provisions of the law came to the view at p 151:

> ... in my opinion, it is not for a court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of fact furnished to him. The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the Executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.

[364] The Supreme Court in *Public Prosecutor v Karpal Singh Ram Singh & another case* [1988] 1 CLJ Rep 249 at p 253 held that what constitutes national security is the province of the Executive and out of the hands of the courts when it said:

> Since *The Zamora* [1916] 2 AC 77 *Courts have come to accept that the best judge of what national security is the authority which has the charge of security i.e the government*. Lord Parker said in that case:
>
> > *Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public*.

[365] The commonly accepted approach to judicial review is that the reviewing court is only concerned with the decision making process and not with the substantive aspect or merits of the decision. Encik Najib Zakaria referred us to *Re Tan Boon Liat @ Allen & Anor et al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108; [1977] 1 MLRA 22 where he submitted that the Federal Court held that ouster clause cannot effectively oust the jurisdiction of court or support the illegality of the decision of the court. However, that case was decided due to procedural non-compliance by the Advisory Board not on the substantive merits. The appellant therein was detained under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. There was a condition precedent which needed to be satisfied, namely the Advisory Board must have made recommendations on the representation made by the appellant to the Yang di-Pertuan Agong for a further detention of the appellant. That condition precedent had not been satisfied and their continued detention was therefore held to be unlawful as it was not in accordance with law which

runs contrary to art 5 of the FC.

Ong Hock Sim FJ was of the view that 'where there has been a misconception as to the power to confirm under s 6(2) which reads:

> 6(2) Upon considering the recommendations of the Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan Agong thereon shall, subject to the provisions of section 7, shall be final, and shall not be called into question in any court.

It is clearly incumbent on this court to rectify the error based on *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at p 208, per Lord Wilberforce). The *Anisminic*'s case centers on the effect of an ouster clause under a subordinate legislation passed under s 4(4) of the Foreign Compensation Act 1950 which provided that the determination by the Foreign Compensation Commission of any application made to them under the Act shall not be called into question in any court of law. The significance of the case is such that despite such an exclusion being clearly worded, the courts will hold that it does not preclude them from scrutinizing the decision on an error of law. Clearly *Re Tan Boon Liat* concerns non-compliance with procedure, not on the facts, which does not support the appellants' case.

[366] Be that as it may, this court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147, has provided an exception to the general rule that the merits and correctness of the decision of the decision making body are forbidden territory. However, such exception is not applicable in every case and it depends on each factual matrix of the case as illustrated by this court in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288 where it was held that although a reviewing judge might not have come to the same conclusion from the established facts, a judge should exercise restraint and should not disturb findings of fact unless it can be shown that the findings was based on grounds of illegality or plain irrationality. The Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 echoed the same sentiment where it held that findings of facts based on credibility of witnesses ought not to be disturbed unless they were grounded on illegality or plain irrationality. But still, these cases dealt with employment cases, nothing to do with art 149 of the FC or preventive laws.

[367] Constitutional dimension was invoked into the judicial review realm in our jurisprudence when the Court of Appeal sought to introduce the concept of 'fairness' under art 8(1) vide *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261. The Court of Appeal held that the requirement of fairness in art 8(1) read together with art 5(1)

ensured not only procedural fairness but also a fair and just punishment imposed. Although admittedly, the word of 'substantive fairness' was not used, the requirement of a fair and just punishment indicates it to be an additional facet of fairness over and above procedural fairness.

[368] Subsequently the courts introduced the concept of the right of an aggrieved party to have access to justice when it invoked cl (1) of art 5 of the FC in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105 (FC); *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289 (CA), when the Court of Appeal held that access to justice is a fundamental and constitutional right. It was also held that the right of a litigant to seek redress from the court is part of one's personal liberty within cl (1) of art 5 and it is not for Parliament to restrict that right. An ouster of jurisdiction by an Act of Parliament would therefore be prima facie void and of no effect.

[369] In *Sugumar Balakrishnan* the Court of Appeal adopted substantive fairness as a new ground of judicial review when Gopal Sri Ram, JCA (as he then was) included the same into the doctrine of fairness in art 8. His Lordship said at p 320:

> The result of the decision in *Rama Chandran* and the cases that have followed it is that the duty to act fairly is recognised to compose of two limbs: procedural fairness and substantive fairness. Procedural fairness requires that when arriving at a decision, a public decision-maker must adopt a fair procedure. The doctrine of substantive fairness requires a public decision-maker to arrive at a reasonable decision and to ensure that any punishment that he imposes is not disproportionate to the wrongdoing complained of. It follows that if in arriving at a public law decision, the decision-maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in substance.

[370] *Sugumar Balakrishnan*'s case relates to an ouster clause in s 59A(1) of the Immigration Act 1959/63 which reads:

> (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director-General, or in the case of an East Malaysian state, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.

Mr Sugumar had applied to the High Court for a writ of *certiorari* to quash the decision of the Sabah state government which revoked his entry permit on grounds of morality. The High Court held that as far as the ouster clause in s 59A(1) of the Immigration Act 1959/63 is concerned, there is no grounds for the courts to exercise judicial review of the Sabah government's decision. Sugumar appealed to the Court of Appeal, which overruled the High Court

and ordered that certiorari be issued to remove and quash the cancellation against the respondent.

[371] However, the Federal Court reversed the decision of the Court of Appeal in *Sugumar Balakrishnan* and struck down the doctrine of substantive fairness. In arriving at its decision, the Federal Court referred to the judgment of Edgar Joseph Jr in *R Rama Chandran* and held that:

> The Court of Appeal seems to introduce the doctrine of substantive fairness as a separate ground in its review of the administrative decision of the State Authority under the Act by invoking art 8(1) read together with art 5(1) of the Federal Constitution. The Court also relied on *R Rama Chandran*.
>
> In our view, *parliament having excluded judicial review under the Act, it is not permissible for our courts to intervene and disturb statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive unfairness as a separate ground of judicial review which even the English courts in common law have not recognised* ... As was stated by Edgar Joseph Jr in *R Rama Chandran* when he observed that courts can scrutinise decisions not only for process, but also for substance, and he certainly was not putting forward a new head for judicial review ...
>
> [W]e cannot agree with the Court of Appeal that the doctrine of substantive fairness can be invoked as a separate or additional ground of judicial review of an administrative decision.

With regard to the Immigration Act 1959/1963 (then), Mohamed Dzaiddin FCJ in the same case held that:

> By deliberately spelling out that *there shall be no judicial review by the court of any act or decision of the Minister or the decision–maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act.*

[372] The Court of Appeal again reaffirmed its stand that access to justice is a fundamental right, this time grounded on art 8(1) of the FC in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1. The Court of Appeal was called to determine on the issue of the constitutionality of s 72 of the Pengurusan Danaharta Act 1998, which relates to a partial ouster clause, which reads:

> 72 Notwithstanding any law, an order of a court cannot be granted —
>
> (a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent advisor under this Act;
>
> (b) which stays, restrains or affects any action taken, or proposed to be taken by the Corporation, Oversight Committee, Special Administrator or Independent advisor under this Act;

(c) which compels the Corporation, Oversight Committee, Special Administrator or Independent advisor to do or perform any act,

and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

The Court of Appeal held that the section was unconstitutional vis a vis art 8(1) of the FC as it violated the common law right of access to justice which is an important component of the Rule of Law. The Court of Appeal viewed this right as follows at p 18 of the judgment:

We would sum up our view on this part as follows: (i) the expression 'Law' in art 8 (1) refers to a system of law that incorporates the fundamental principles of natural justice of the common law: *Ong Ah Chuan v Public Prosecutor*; (ii) the doctrine of the rule of law which forms part of common law demands minimum standards of substantive and procedural fairness;

Pierson v Secretary of State for the Home Department; (iii) access to justice is part and parcel of the common law; *R v Secretary of State for the Home Department, ex parte Leech*; (iv) the expression 'law' in art 8(1), by definition (contained in art 160 (2)) includes the common law. Therefore access to justice is an integral part of art 8 (1).

[373] The Federal Court however, overruled the Court of Appeal and held that the Court of Appeal had erred in interpreting art 8(1) and art 160(2) of the FC. Article 160(2) authorises the reception of common law 'in so far as it is in operation in the Federation ...' which refers to a law that has already brought into operation the common law of England in the Federation. That law is s 3(1) of the Civil Law Act 1956 ('the CLA'), which allows the reception of English common law subject to the qualification that it may be lawfully modified in the future by any written law. Federal Court held that art 160(2) must be construed in the light of s 3(1) of the CLA in that it may be modified when necessary. To that extent it is qualified and not absolute.

[374] The word, 'common law' in art 160(2) FC is a reference to common law and it is in that sense that the right must be incorporated into art 8(1). As the continued integration of the common law right of access to justice into art 8(1) depends on any contrary provision that may be provided in any written law as provided by s 3(1) of the CLA, it cannot amount to a guaranteed fundamental right.

[375] The Federal Court held that the right of access to justice must be subject to rules and regulations that enable the exercise of that right, which may be varied from time to time, in particular art 121(1) of the FC, which confers jurisdiction to the High Court. The Federal Court further said that arts 8(1) and 121(1) complement each other, in that, art 8(1) confers a general right,

whereas art 121(1) confers powers on Parliament to set up an institutionalised mechanism with the power and jurisdiction on the extent and manner in which that right is to be exercised. The Federal Court in its judgment said:

> The jurisdiction and power of the courts as provided by law is clearly the dominant element which determines the boundaries of access to justice. Article 8(1) cannot therefore be read in isolation ... *The corollary is that the manner and extent of the exercise of the right of access to justice is subject to and circumscribed by the jurisdiction and powers of the court as provided by Federal Law.* (Emphasis added.)

[376] In applying the principle as aforesaid, this court held that s 72 of the Pengurusan Danaharta Act is a federal law enacted by Parliament under the authority and scope of art 121(1) of the FC and is a written law within the meaning of s 3(1) of the CLA, which modifies the right of access to justice as is permitted by the same. The right of access to justice integrated into art 8(1) must therefore be read in accordance to the modifications made.

[377] The Federal Court also overruled the Court of Appeal's ruling on the broad interpretation of art 5 in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 when it held that a generous reading of the term 'personal liberty' in art 5 was in error by justifying it as follows:

> we therefore disagree with the Court of Appeal that the words 'personal liberty' should be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the quality of life ... We agree with the learned State Attorney General that the entry permit only allows the respondent to enter and reside in Sabah, but *ipso facto* the entry permit does not confer any right to livelihood to the respondent.

[378] Although the High Court and the Court of Appeal in *Sugumar Balakrishnan* differed in their ultimate decision as to the effect of the ouster clauses, both were in consensus, namely, in the context of habeas corpus applications, where the scheme of the legislation deals with 'preventive detention', the effect of ouster clause may be given different treatment. It has been held that national security involves question of policy and that is within the province of the Executive to determine. This can be discerned from the judgment of the learned High Court judge in *Sugumar Balakrishnan* when he held at pp 242–243:

> It was also submitted that *the present case is one which involves public policy, national interest, public safety or national security and the court is therefore, submitted learned counsel, entitled to carry out an objective examination of the factual matrix presented to it to ascertain whether a reasonable tribunal similarly circumstanced would have come to the decision as the director did*, ...
>
> ... *As for the question of public policy, I am unable to agree that this case is not concerned with it. It is very much so because it involves the manner in which a state executive or the*

state authority goes about overseeing immigration matters. It is unthinkable for the court to venture into making decisions as to when and whom should be issued an entry permit as to when and why an entry permit should be cancelled. Those are surely matters of policy which are best left to the Executive ... (Emphasis added.)

[379] Whilst the Court of Appeal speaking through Gopal Sri Ram JCA (as he was then) acknowledged in the same case, at p 309 when His Lordship said:

> ... Nothing we have said thus far is to be taken as affecting cases that involve either national security or national interest. It is obvious that special consideration must be given to those cases as a matter of judicial policy (see for example, *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293). *In such cases, the court declines to intervene perhaps, on limited procedural ground excepted by s 59A because the subject matter in respect of which judicial review is sought is one that is best left to the Executive arm of the Government to deal with according to the exigencies of the particular case and based upon information that is exclusively available to it. For reasons that will become apparent later, the present instance is one that does not evidentially fall within these special categories of cases*. (Emphasis added.)
>
> ...
>
> (1) *There are cases which by their very nature render it neither feasible nor desirable to require public decision-maker to give reasons for his decision. These include cases that concern national security, public safety or public interest*. See *Re Tan Sri Raja Khalid bin Raja Harun*; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*.

[380] From the passages of the judgments of the High Court and the Court of Appeal in *Sugumar Balakrishnan* the conclusion that can be drawn, is that, ouster clause is effective in cases concerning national security and contingent upon the determination of security policy which is the province of the Executive. Although Gopal Sri Ram, JCA (as he then was) rejected the High Court judge's reasoning who considered *Sugumar Balakrishnan* is the kind of cases concerning security in nature, both agreed that different treatment for ouster clause is considered for cases concerning national interest, security and public safety, namely that courts should not intervene on substantial merits except on procedural grounds as substantial merits of the case is one that is best left to the Executive.

[381] Apart from *Sugumar Balakrishnan*, this court in a series of cases, namely:

(a) *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81; [2003] 2 MLRA 399;

(b) *Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320; [2005] 4 CLJ 445;

(c) *Ambiga a/p Sreenevasan v Director of Immigration, Sabah, Noor Alam*

Khan bin A Wahid Khan & Ors [2018] 1 MLJ 633; [2017] 9 CLJ 205;

(d) *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah* [2018] 12 MLJ 49; [2018] 8 CLJ 273;

(e) *Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors* [2020] 1 MLJ 351; [2020] 1 CLJ 747; and

(f) *Salihudin bin Hj Ahmad Khalid & Ors v Pendaftar Pertubuhan Malaysia & Anor* [2020] 2 MLJ 244; [2020] 2 CLJ 849,

had dealt with provisions of ouster clauses which were inserted in the relevant laws (as each of the aforesaid cases dealt with different security preventive laws although the provisions are identical in its wordings) with the intention to oust the court's power to review all acts done or decision made in the exercise of the Minister/executive's discretionary powers except on non-compliance with any procedural requirements. It had been decided in the aforesaid cases that those ouster clauses are constitutional.

[382] The reasoning from the aforesaid cases lies as follows: as for the provision on fundamental liberties, there is the recognition of the need for restriction by legislation in situation for the curtailment of subversion, enacted under art 149 of the FC or legislation to combat an emergency situation which may suspend all fundamental rights except freedom of religion.

Clear and explicit provision as to the ouster clause

[383] Judicial review, can be excluded by an Act of Parliament, if it is specifically provided for and the words used are clear and explicit. It also forms the basic principle to be applied in interpreting a statutory provision, (especially the impugned ouster clause) which is to apply the words and phrases of the statute in their ordinary meaning. This is the first and most elementary rule of construction. One 'must adhere to the words of an Act of Parliament, giving to them that sense is their natural import ...' (see the Federal Court case of *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69).

[384] It is also trite principle of law that a subject's recourse to the court for the determination of his rights is not to be excluded unless by clear and express words (*Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 as cited by *Sugumar Balakrishnan*), and there has been a plethora of cases which support the view that where rights are taken away by legislation this should be done by clear explicit terms. In this respect the judgment of Lord Hoffman in *R v Secretary of State for the Home Department, ex p Simms* [2002] 2 AC 115 is relevant, although it does refer to a country with Parliamentary sovereignty:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... The constraints upon its exercise by parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[385] Parliament has engaged clear words in s 15B(1) of the POCA and the provision had been drafted with precise clarity, that there shall be no judicial review by the court of any act or decision by the Board in exercise of its discretionary power in accordance with the Act except for non-compliance of any procedural requirement. Judicial review under the section is defined to include proceedings instituted by way of a writ of habeas corpus. Due to the clarity in the wordings in the said section, there is no doubt as to the intention of the Legislature that the section is conclusive on the exclusion of judicial review in habeas corpus cases under the Act.

[386] Such effect of the ouster clause in s 15B(1) of the POCA has excluded judicial review of the act of the Board save and except for procedural non-compliance. It is not permissible for the court to intervene and disturb a statutorily unreviewable decision after Parliament having excluded judicial review. The intention of Parliament or of the Executive is revealed in the Act of Parliament by the language used and the courts should carry out these intentions. It is not the function of the judge to read something into the provision which is not there. If he does so, he is indeed encroaching on the function of the Legislature.

[387] The Supreme Court in *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449 ruled that a court should not read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. The Supreme Court stated:

> We can see no justification for extending the ambit of s 9(b) of the Act and say any exercitation purporting to fill in textual details in a statute on policy considerations would be, to reiterate what was said in *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ, no less than an unwarranted judicial transgression into the legislative arena and an attempt to obturate a statutory hiatus (if indeed there is any but we see none in any event in this case) which is not a curial function. We would in this regard also advert to the decision of the House of Lords in *Thompson v Goold & Co* [1910] AC 409, 420 where Lord Mersey said in his speech (at p 420):
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> > 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do'.

Even more pertinent perhaps would be the speech of Lord Lorebum, LC, in Vickers, Sons and Maxim, *Limited v Evans* [1910] AC 444, 445 when he said (at page 445):

> My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; ...
>
> The appellants contention involves reading words into the clause. The clause does not contain them; and we are not entitled to read words into the Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.

[388] Steve Shim CJ (Sabah and Sarawak) in delivering the judgment of the Federal Court in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81; [2003] 2 MLRA 399 in dealing with the provisions of ss 8B(1) and 8C of the ISA 1960 expressed the view that the court's jurisdiction to review under those provisions was ousted. The cardinal principle which was upheld is that where the intention of Parliament is clearly expressed, the duty of the court is to give effect to that intention. The intention of Parliament is to be garnered from the wordings of the ouster clause. Steve Shim FCJ referred to *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 and said that *appellate review jurisdiction is solely a creature of statute while supervisory review jurisdiction is the creature of common law and is available in the exercise of court's inherent power but, its extent may be determined not merely by judicial development but also by legislative intervention. Hence Parliament may legislate on the extent and scope of judicial review in a particular situation.* It was held that the ouster clauses in ss 8B(1) and 8C restrict and limit the grounds upon which challenges to the Minister's exercise of discretion could be premised. The exercise of the Minister's discretion in issuing orders for detention cannot be questioned in courts of law except on issue of non-compliance with the procedural requirements. The ouster clauses were held to be constitutional.

[389] The ratio in *Nasharuddin Nasir* was adopted by this court in *Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320; [2005] 4 CLJ 445 where it held:

> The constitutionality and effect of those provisions had been considered in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81. In brief, this court had decided that s 8B of the ISA was not unconstitutional and that the words of that section clearly excluded the court's review jurisdiction and that the court must give expression to parliament's intention.

[390] The Federal Court in the appeal of *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md*

Zakariah [2018] 12 MLJ 49 at pp 62–63; [2018] 8 CLJ 273 at p 285 has this to say:

> [39] The sole point in considering question 1 is the legal effect to be given to sub-s 8B (1) and s 8C of the ISA. It relates to the statutory construction and interpretation of the provisions and the determination of whether the wordings of those provisions effectively oust the jurisdiction of the courts to deal and to award damages in respect of the claim.
>
> [40] *Judicial review*, which is essentially a creature of the common law, can be excluded by an Act of Parliament, if it is specifically provided for and the words used are unmistakably explicit. On this issue, Steve Shim CJ (Sabah and Sarawak) (delivering the judgment of the Federal Court) in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81; [2003] 2 MLRA 399 in dealing with the provisions of the same sub-s 8B (1) and s 8C of the ISA, had expressed the view that the court's jurisdiction to review under those provisions was ousted. *The cardinal principle is that where the intention of Parliament is clearly expressed, the duty of the court is to give effect to that intention. The intention of Parliament is to be garnered from the wordings of the ouster clause*.
>
> ...
>
> [42] Subsection 8B (1) is clearly intended to exclude judicial review by the court of any act done or any decision made by the Minister in the exercise of his power in accordance with the ISA except as regards any question on non-compliance with any procedural requirement relating to the act or decision in question. The words in sub-s 8B(1) are explicit, clear and precise in ousting the jurisdiction of the courts.
>
> [43] The ouster clauses in sub-s 8B(1) and s 8C restrict and limit the grounds upon which challenges to the Minister's exercise of discretion could be premised. The exercise of the Minister's discretion in issuing orders for detention cannot be questioned in courts of law except on issue of non-compliance with the procedural requirements. The ouster clauses are not unconstitutional (see: *Kerajaan Malaysia & Ors v Nasharuddin Nasir*)
>
> [44] Subsection 8B (1) and s 8C were incorporated into the ISA by the Internal Security ... (Emphasis added.)

[391] Adopting the views as aforementioned, the words in s 15B of POCA are plain and unambiguous, in that it expressly excluded judicial review of the Board's decision save and except in procedural non-compliance. Given that s 15B was enacted under art 149 and that it has been drafted with prescience and perfect clarity, it is not the function of the court to give a different meaning that was intended by the Legislature.

Policy matters not within the province of the courts

[392] We need to be reminded that a law although appears to be unjust or unfair, is a matter touching on policy which is within the province of the Legislature. In terrorism, gangsterism and gang-violence, syndicated crimes or

crimes involving a substantial body of persons, generally the laws legislated are preventive in nature. The courts are never equipped with such knowledge and resource as to the extent of the incursion or threats to the security of the country and the general masses, sufficient to make a determination on the policy to be adopted in determining preventive measures in security laws of the nation. We are referring to 'preventive' and not 'reactive' action ought to be taken to address such risks of effect of terrorism and gang-violence on the public.

[393] How much or how serious are such threats are matters within the Legislature and from their knowledge and resources available to them in determining the policy to be devised to combat, control and regulate such threats or activity with the objective of the laws in mind. Apart from such knowledge are not within the province of the courts, neither is it made available to the courts. Hence what was said by Raja Azlan Shah FCJ in *Loh Kooi Choon* stood the test of time when His Lordship reminded the courts as to its role and function that question of policy is to be debated and decided by Parliament, when His Lordship in his judgment said:

> *The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 118:
>
> > Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. *The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction*. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.
>
> *It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction'*-per Roskill LJ in *Henry v Geopresco International Ltd* [1975] 2 All ER 702, 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the Legislature, and not the courts; they have their remedy at the ballot box. (Emphasis added.)

[394] Gopal Sri Ram, JCA (as he then was) sitting in the Supreme Court in a unanimous decision in *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 at p 799 held that in judicial review:

> ... there may be cases in which — *for reasons of public policy, national interest, public*

safety or national security — it may be wholly inappropriate for the courts to attempt any substitution of views. Unlike the Executive, the Judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations. Each case must be considered on its own facts and it would be quite unwise to attempt the formulation of an all-embracing rule.

[395] Section 15B of the POCA was passed and had been exhaustively debated by Members of the House and gone through the various stages of readings before finally receiving the Royal Assent and it was approved with a particular objective in mind.

Point (iv): Whether s 15B of the POCA which seek to oust the courts from exercising its rights under art 4(1) of the FC contravenes that very Article and to that extent contravenes the ' basic structure' of the FC

The concept of 'basic structure'

[396] The concept of 'basic structure' which was referred to, by the Federal Court in *Semenyih Jaya* relied on the judgment of the Indian Supreme Court of *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461. This decision of the Supreme Court of India outlined the basic structure doctrine of the Constitution of India, which asserted that the Constitution possesses a basic structure of constitutional principles and values. The court partially overruled the prior precedent of *Golaknath v State of Punjab* 1967 AIR 1643; 1967 SCR (2) 762 which held that constitutional amendments pursuant to art 368 (on the amendment of the Indian Constitution) were subject to fundamental rights review, by asserting that only those amendments which tend to affect the 'basic structure of the Constitution' are subject to judicial review. At the same time, the aourt also upheld the constitutionality of first provision of art 31C, which implied that any constitutional amendment seeking to implement the 'Directive Principles of State Policy', which does not affect the 'Basic Structure', shall not be subjected to judicial review.

[397] Essentially, the effect of the judgment of *Kesavananda Bharati* is that certain provisions which form the basic structure of the Indian Constitution is not amenable to any amendment. The court will decide on a case by case basis as to what amounts to/which provision of the Constitution forms the basic structure, as there is no reference in the Constitution as to which provisions constitutes the 'Basic Structure'. The courts will then apply the basic structure principle as a basis to review and to strike down amendments to the Constitution enacted by Parliament (which the court is of the view) seeks to alter the basic structure of the constitution.

Concept of 'basic structure' vis a vis in the Malaysian context

[398] Many jurisdictions embraced this basic structure concept in incorporating in their interpretation of the provision of their Constitution, and Malaysia through the decisions in *Sivarasa Rasiah* and *Semenyih Jaya* is no exception in readily accepting and adopting such concept/doctrine. So important is this concept that counsel for the appellants submitted that the cases pre *Semenyih Jaya* that decided that ouster clauses like 15B of the POCA are constitutional, are no longer applicable. Hence we feel the need to explain this concept and its applicability in determining the constitutionality of the laws passed by Parliament in the context of POCA.

[399] The basic structure concept as enunciated by *Kesavananda Bharati* is nothing novel as far as the Malaysian jurisprudence is concerned, as it was already considered and rejected by this court through the judgment of Raja Azlan Shah FJ (as he then was) in *Loh Kooi Choon*. In delivering his judgment His Lordship had referred to the basic structure principle as postulated by *Kesavananda Bharati.* His Lordship was not in favour of adopting it when he held that:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because *our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions'* — see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544 at p 551. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.
>
> ...
>
> It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with 'power of formal amendment'. They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A constitution has to work not only in the environment in which it was drafted but also centuries later ...
>
> There have also been strong arguments in support of a doctrine of implied restrictions on the power of constitutional amendment. A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.

[400] Gopal Sri Ram FCJ (as he then was) in *Sivarasa Rasiah* rejected the reasoning of Raja Azlan Shah FCJ in *Loh Kooi Choon* as His Lordship referred

to Lord Macnaughten's judgment in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 and said that His Lordship's reliance on the said case was misplaced because:

> ... the remarks were there made in the context of a country whose Parliament is supreme. The argument has merit. As Suffian LP said in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112:
>
> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State Legislatures in Malaysia *is limited by the Constitution*, and they cannot make any law they please. (Emphasis added.)

[401] However, we are of the view that what was said by Lord Macnaughten in *Vacher*'s case, is valid even in the Malaysian context. It is not in dispute that the duty of the court is to expound the language of the law in accordance with settled rules of construction. Policies of laws are certainly not within the province of judicial tribunal, it is with the Executive. The remedy of the fear that the Legislature may legislate laws which are 'unreasonable', 'unacceptable', 'cruel' or 'harsh', or that the wisdom of those in the Legislature are in question, lies in the ballot box, not in the courts being creative and resourceful in amending the laws, for the simple reason that it is not the function of the courts. Hence the words of Lord Macnaughten 'Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the Executives/Legislatures, and not the courts; they have their remedy at the ballot box' rings true to its form to a large extent.

[402] Although the case of *Sivarasa Rasiah* had overruled *Loh Kooi Choon*, it failed to consider the judgment of this court through the judgment of Suffian LP in *Phang Chin Hock* whereby His Lordship had also considered *Kesavananda Bharati's* basic structure doctrine and also rejected the doctrine with its implied limitation on constitutional amendment due to the different make up of the Indian Constitution and the FC. It is interesting to note that Suffian LP did not place any reliance on the *Vacher*'s case and yet he arrived at the same conclusion as Raja Azlan Shah FCJ in *Loh Kooi Choon*.

[403] Suffian LP in *Phang Chin Hock* explained explicitly and in detail as to why the basic structure doctrine may be applicable to a Constitution like India which has been made by 'a Constituent Assembly' set up under the Indian Independence Act 1947. We need not repeat it here.

[404] Suffian LP further reiterated that the 'Directive Principles of State Policy' of the Indian Constitution 'are the moral ends to be served by the Government'. There is no such explicit statement of principles in the FC. It was said that the Constituent Assembly's Preamble and the Directive Principles

contain 'ideas and philosophies animating the Indian Constitution and controlling its interpretation so much so that there are limits on the power of the Indian Parliament to amend the Constitution. Whereas in Malaysia this is not the case with the FC, therefore there is no inherent limitation on the extent to which the FC may be amended.

[405] Thus Suffian LP agreed with the observations made by Raja Azlan Shah FJ in *Loh Kooi Choon* on the inapplicability of adopting the basic structure principle as there are differences in the make-up of the Indian and the Malaysian Constitutions and His Lordship held that:

> Considering the differences in the making of the Indian and our Constitutions, in our judgment it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend the Indian Constitution.

[406] Apart from the case of *Kesavananda Bharati*, the Federal Court in *Phang Chin Hock* considered several other Indian cases on the issue of the basic structure doctrine namely, *Shankari Prasad Singh Deo v The Union of India and others* AIR 1951 SC 458; *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845; *Golaknath v State of Punjab* 1967 AIR 1643; 1967 SCR (2) 762 before deciding that the basic structure principle is inapplicable in the Malaysian context.

[407] Singapore, through *Teo Soh Lung v The Minister for Home Affairs and Ors* [1989] 2 MLJ 449 echoed what was held in *Loh Kooi Choon* and *Phang Chin Hock* with regards to the inapplicability of adopting the basic structure doctrine when it held that:

> (8) If the framers of the Singapore Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations but art 5 has no such limitation.
>
> (9) If the courts have the power to impose limitations on the Legislature's power of constitutional amendments, *they would be usurping Parliament's le gisla tive f u n ction co ntrary to a rt 5 8 of the Constitution*.
>
> (10) The *Kesavananda* AIR 1973 SC 1461 doctrine (That there were basic features of the Constitution that parliament could not amend) is not applicable to the local Constitution. Considering the differences in the making of the Indian and the local Constitution, it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend their Constitution. (Emphasis added.)

[408] In India, the period following *Kesavananda Bharati* was one when the doctrine evolved on a case by case basis resulting in a gradual expansion of the doctrine. It was only in subsequent cases pioneered by *Indira Ghandi v Raj Narain* AIR 1975 SC 2299 that the courts began formulating a cohesive

doctrine of what constituted the basic structure of the Indian Constitution.

[409] Apply this doctrine to the Malaysian context, vis a vis the FC: the FC does not state which are the provisions that form the basic structure. How is the court to determine what are the provisions that form the basic structure of the Constitution. There is no basis or underlying power to enable the courts to do this.

[410] As the concept of basic structure is vague and indefinite, it would be left open to each Judge to come up with what each of them would term as 'basic structure' of the FC, which leads to 'uncertainty' in the interpretation of the FC and the laws. There is no definite guidance as to what is and how to define the basic structure or what is the applicable test of guidance. In India, the list of what is basic structure continues to develop according to the judge's interpretation (see for example the different features of basic structure as interpreted by each of the judges forming the majority judgment in *Kesavananda Bharati*). It was lamented that a precise formulation of the basic features would be a task of greatest difficulty and would add to the uncertainty of interpreting the scope of art 368 which is the provision on amendment (Seervai, HM (2008), Constitutional law of India (Delhi: Universal Law Publishing)).

[411] Central to the concept of basic structure is that, the provisions of the constitution which are implicitly regarded as constituting the basic structure, are not subjected to any amendments, in perpetuity.

[412] In matters of interpretation, between the implicit concept and the express textual provision, we are of the view that the express textual provision shall take precedence in the principles of interpretation. To hold to the view that what constitutes basic structure in our FC cannot be amended, would go against *the clear and express provision* of our very own art 159 of the FC which allow for amendments according to the required mandatory pre-conditions. As per Raja Azlan Shah FJ in *Loh Kooi Choon*:

> It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with 'power of formal amendment'. They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later ...

[413] Putting an implied limitation on the powers of Parliament as postulated by the basic structure concept, clearly contravenes the very provision of the FC as art 4(1), which states that the FC is supreme and that only Parliament have the power to make constitutional amendments even if they are inconsistent with the FC. Parliament may amend the FC as it deems fit, so long as they comply with the necessary requirements precedent and subsequent regarding the manner and form prescribed by the FC as stated in art 159. In addition, putting an implied limitation on the powers of Parliament as postulated by the basic structure concept 'concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power' (as per Azlan Shah FJ (as he then was) in *Loh Kooi Choon*). Following thereto, as was aptly held by Suffian LP in *Phang Chin Hock*:

> (3) it is unnecessary ... to decide whether or not Parliament's power of constitutional amendment extends to destroying the basic structure of the Constitution.

[414] In the context of the challenge in the present appeal, the determination of the constitutionality of the impugned provision has to be based on what is provided in the FC. It cannot be premised on some foreign basic structure concept which is amorphous where uncertainty will ensue in the application of our law. Historically, and textually, there is nothing in our Constitution to indicate which provision constitutes basic structure and hence, unamendable or to remain as eternity clause.

[415] One must bear in mind of the dangers of relying on concepts/theories which had developed mostly in foreign countries, as they evolved from the historical, social and political context of foreign nations. The basic structure concept which took root in an alien soil under a distinctly different constitution and differs from our own historical and constitutional context, should not be pressed into use in aid of interpretation of our very own FC. There is a need for deeper analysis of the rationale and specific historical background which underpins such foreign doctrines, no matter how popular it may seem. The basic structure concept was accepted by the courts in India at the material time due to the political and social climate surrounding the composition of the Executives and the Judiciary at that time which was only peculiar to India then. Such is not the situation in this country.

[416] The adoption of the basic structure doctrine would create a situation that although Parliament had followed the procedure in amending the laws as stated in art 159, nevertheless the courts can strike it down, if in the opinion of the courts that the amending law struck at the basic structure of the FC. Hence, the court will declare that Parliament has no power to amend that particular Article when art 159 of the FC allows it, if the correct procedure is followed. Does that not seem like the courts are over and above the FC, thus going

against what art 4(1) provides?

[417] Hence, to sum up, on point No (iv): given the aforesaid, the basic structure doctrine is not applicable in construing the constitutionality of s 15B(1) of the POCA in view of art 159. There is nothing stated in the FC as to which provision in the FC forms the basic structure. To challenge the constitutionality of s 15B of POCA, it has to be tested against any of the provisions of the FC, not against the concept of basic structure. Section 15B of the POCA derived its force of law and validity from art 149 of the FC. It cannot be said that s 15B oust the courts from exercising its powers under arts 4(1) or 121(1) of the FC. The courts can exercise its supervisory judicial powers in cases where there is non-compliance of procedural requirement. It is not the basic structure that an aggrieved person is entitled to the fullest form of remedy in challenging a public authority's decision. Neither can it be said to contravene art 4(1) and to that extent contravenes the 'basic structure' of the FC.

Effect of the trilogy of cases

[418] Counsel for the appellants relied on the trilogy of cases of *Semenyih Jaya*, *Sivarasa Rasiah* and *Indira Ghandi* to support the contention of the unconstitutionality of s 15B of the POCA. However, such reliance is misplaced as to the facts and constitutional issues raised in the trilogy of cases are distinguishable and the provisions which the cases dealt with were not enacted pursuant to art 149 of the FC. The distinguishing facts and issues in the trilogy of cases are as follows:

(a) *Sivarasa Rasiah* concerned a challenge by the appellant on the provision of the Legal Profession Act 1976 as to his rights to be elected to the Bar Council;

(b) *Semenyih Jaya* is a challenge against s 40D of the Land Acquisition Act 1950 which claimed that the presence of assessors in the determination of compensation to owners of land acquired usurps the powers of the court; and

(c) *Indira Ghandi a/p Mutho* relates to the jurisdiction of the civil courts in dealing with whether the certificate of conversion issued by Pengarah Jabatan Agama Islam Perak which converted the three children of Mrs Indira Ghandi is valid. It concerned the interpretation of art 121(1A) of the FC, in particular whether the clause had the effect of granting exclusive jurisdiction on Syariah Court in all matters of Islamic Law including those relating to judicial review. Hence, *Indira Ghandi* concerned a jurisdictional issue whether the Syariah Court had certain powers to the exclusion of the civil courts.

[419] All the impugned legislations in the three aforesaid cases were not

enacted pursuant to art 149 of the FC and it has got nothing to do with laws pertaining to preventive detention or national security of the country. In addition there was never any attempt to amend any of the provisions of the FC in the trilogy of cases cited, that justified the importation of the basic structure concept.

[420] The distinguishing factor between the trilogy of cases and the present appeals is that, the present appeals are not concerned with the issue of removal of judicial power or conferment of judicial power to non-judicial branch (as in *Semenyih Jaya*) or jurisdictional issue (as in *Indira Ghandi*).

[421] This court in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1, referred and agreed to the reasoning by Raja Azlan Shah FCJ in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; [1975] 1 LNS 90 which held that *in determining the 'constitutionality or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers' and that 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it'.*

[422] That has been the position until *Sivarasa Rasiah* was decided by this court in 2010. The learned judge in *Sivarasa Rasiah* made three preliminary observations and imported the basic structure concept in reliance on *Kesavananda Bharati*. It is undisputed that *Sivarasa Rasiah* was never about the challenge on the basic structure of the FC and neither was it an attempt to amend the provision of the FC. From the three broad grounds relied upon, by the appellant therein, he was challenging s 46(1) of the Legal Profession Act 1976 as against specific provisions of the Constitution, namely:

(a) that the section violates his rights of equality and equal protection guaranteed by art 8(1) of the Constitution;

(b) that it violates his right of association guaranteed by art 10(1)(c); and

(c) that it violates his right to personal liberty guaranteed by art 5(1).

Notably also that, in the event the said section violates any provisions of the FC, the same would be struck down as being unconstitutional, regardless whether it forms the basic structure of the FC. Whatever may be the features of the basic structure of the FC the impugned provision of the Legal Profession Act 1976 had not destroyed the basic structure (whatever that may be) of the FC. Neither was there any attempt by the appellant therein, to amend any provision of the FC. Hence there is no necessity to introduce or import the basic structure principle or the implied limitations on the power of constitutional amendment in *Sivarasa Rasiah*, as it was never applied any way. Therefore the decision of *Sivarasa Rasiah* vis a vis the basic structure doctrine, was, at best obiter.

[423] Despite the basic structure doctrine was never applied, the judgment in *Sivarasa Rasiah* established the principle and the law that some provisions of our FC form the basic structure of the FC and cannot be amended by Parliament at all, and it was readily adopted by *Semenyih Jaya*. Further the judgment also laid down the principle that if Parliament amends such provision which forms the basic structure of the FC, the court will (when challenged in court) strike down such amendment, although it was unclear as to which provision form the basic structure of the Constitution and where precisely would the courts obtain such powers to do so.

[424] Hence the reliance on the basic structure concept premised on the trilogy of cases to strike down s 15B, enacted by Parliament despite it being enacted according to art 149 is, with respect, misplaced.

The case of R (on the application of Privacy International v Investigatory Powers Tribunal and others [2019] UKSC 22 and its application to s 15B(1) of the POCA

[425] The case of *Privacy International,* is seminal as it has been perceived to have diluted the concept of Parliamentary sovereignty, while strengthening the constitutional separation of powers between the Legislature, executive and judiciary. The Supreme Court of UK in its judgment, by a slim majority of 4:3 held that an 'ouster clause' in s 67(8) of the Regulation of Investigatory Powers Act 2000 ('the RIPA'), that purports to exclude from challenge or appeal *any decision* of the Investigatory Powers Tribunal ('IPT'), does not prevent a judicial review challenge based on an *error of law*.

[426] The case of *Privacy International* strikes at the issue of whether the court has jurisdiction to judicially review decisions of the Investigatory Powers Tribunal (IPT) despite the exclusion of such jurisdiction by s 67(8) of the Regulation of Investigatory Powers Act 2000 ('the RIPA'). IPT is the body which has jurisdiction to examine the conduct of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters (GCHQ). IPT is the court where a person can challenge the lawfulness of a decision to put them under surveillance.

[427] Privacy International, the claimant, sought to challenge the IPT's interpretation of s 5 of the Intelligence Services Act 1994 *as an error of law* before the High Court but they were confronted by s 67(8) of the RIPA. Section 67(8) provides as follows:

> Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.

[428] The courts were tasked to determine whether, on its proper construction, s 67(8) of RIPA precluded judicial review of such decisions. Notably, s 67(8) of the RIPA is a *complete ouster clause* as opposed to s 15B of the POCA which is a *partial ouster clause*.

[429] The majority held that, as a matter of construction, the wordings in s 67(8) was not explicit enough to exclude judicial review. It was suggested that a more explicit formula could have excluded challenges to any determination or 'purported determination' as 'a nullity by reason of lack of jurisdiction, error of law, or any other matter' (para [111]). Hence the majority held that there was no 'ouster' of the High Court's jurisdiction to review a decision of the IPT for an error of law. Although obiter, the majority remarked that it is ultimately for the courts, not the Legislature, to determine the limits set by the rule of law to the power to exclude judicial review.

[430] Lord Sumption and Lord Wilson in their dissenting judgment held that s 67(8) cannot be any clearer in ousting the court's jurisdiction and that the rule of law was 'sufficiently vindicated' by the judicial character of the IPT (para [172]). Lord Sumption also considered that the part in parenthesis in s 67(8) which includes within the 'ouster' clause challenges to decisions of the IPT as to whether it has jurisdiction, was included by the Parliamentary draftsman expressly to address the *Anisminic* judgment, and was sufficient to oust the court's jurisdiction even in respect of errors of law. Lord Wilson was of a similar view.

[431] However, Lord Sumption considered that while s 67(8) was clear enough to oust a review of the IPT's substantive decision (ie a merits review), if there were manifest, procedural failings then the ouster clause would not apply (para [205]).

[432] It is important to analyse the focus and context used by both the Court of Appeal and the Supreme Court in *Privacy International*. It is rather interesting not to lose sight of Sales LJ, who was a notable and well known public law litigator prior to his Lordship's elevation to the English Bench. Sales LJ, in delivering the majority decision of the Court of Appeal, focused more on the legislative context of s 67(8) and his emphasis on the nature of the subject matter with which the IPT deals, ie security matters. His reasoning at paras [7], [10], and [12] of the judgment are illustrative.

> [7] The context in which the IPT functions is one in which there is particular *sensitivity in relation to the evidential material in issue and the public interests which may be jeopardised if it is disclosed. The intelligence services may have valuable sources of information about terrorist organisations, organised crime and hostile activity by foreign powers which would be lost if those targets of investigation and monitoring became aware of them. Human sources, such as informers, might be killed or threatened*

with serious harm if their identities (or even the possibility of their existence) were revealed. Technological capacities to obtain information might be rendered useless if it were revealed they existed and new strategies to evade them or block them were developed. Opportunities for exploitation of simple lapses of care on the part of targets which allow the intelligence services to obtain valuable information about them would be lost if the targets learned about them and tightened up their procedures. The aspects of the public interest which would be jeopardised if these things occurred, as referred to in r 6(1), are of the most pressing importance.

...

[10] *The legislative regime for the IPT deliberately creates a judicial body with powers to examine in private and without disclosure any relevant confidential evidence which cannot safely be revealed to the complainant,* which body is at the same time subject to an imperative overriding rule which forbids it from requiring disclosure of such material. In this way, the regime provides a guarantee that the important aspects of the public interest referred to above are safeguarded while at the same time enabling the IPT to examine the merits of claims against the intelligence services and others on the basis of the relevant evidence in a closed proceeding.

...

[12] *In my view the procedural regime governing the IPT and its differences from that applicable to the ordinary courts at the time RIPA was enacted are significant features of the legal context in which s 67(8) of RIPA falls to be construed.*

[433] Employing a literal interpretation, Sales LJ ruled that s 67(8) operates as an effective *ouster clause with the effect of totally excluding the supervisory powers of the High Court*, including in respect of the IPT's decisions which are erroneous in law. He was of the view that the language of s 67(8) was clear and unambiguous. It was materially different from the language considered by the House of Lords in *Anisminic*, especially the words in parentheses. Section 67(8) also applies to IPT's decisions arrived in an unfairly manner. *But in the context of s 67(8) of RIPA, the IPT's decision on the point would be a decision as to whether they had jurisdiction to proceed in the particular way in issue, which could not be questioned in any court.*

[434] For Sales LJ, some limitation on the rule of law and a total exclusion of the supervisory powers of the courts are justified if the subject of a judicial review proceeding concerns security matters.

[435] Sales LJ's approach to security matters is more restrictive than the regime provided for under POCA. POCA was drafted to strike a balance between fairness to complainants to raise legal issues on procedural non-compliance with the Act itself and the need to safeguard security interests. These interests could also include the non-disclosure of sensitive material and confidential information establishing the facts which goes to the merit of the arrest and detention of a detainee.

[436] Sales LJ's national security exceptionalism was considered by the Supreme Court. Here, the focus of the Supreme Court's majority decision by Lord Carnwath in *Privacy International* was directed at *the total non-reviewability of the IPT's decisions which are erroneous in law.*

[437] *The majority view of the Supreme Court held that clear words must be used to exclude judicial review*.

[438] The majority view by Lord Carnwath distinguished the IPT's decisions which are wrong in law with those which are wrong in facts. Lord Carnwath ruled that s 67(8) of the RIPA applies to IPT's decisions which are wrong in law. Similarly, Lord Lloyd-Jones, who delivered a supporting judgment of the majority, agreed at para [166] of the judgment that s 67(8) does not apply to errors of fact.

[439] The distinction between errors of fact and errors of law as articulated by Lord Carnwath and Lord Lloyd-Jones is consistent with the legislative scheme in POCA. Section 15B allows judicial review in respect of procedural non-compliance (which is an aspect of law) and excludes judicial review in respect of the Board's decision on non-procedural aspects such as the reasons and merits behind a person's arrest and detention (which is a decision based on facts).

[440] The Supreme Court's conception of the rule of law is one that exist side by side with parliamentary sovereignty and that it is for the courts to determine the limits set by the rule of law to the power to exclude judicial review. In answering the second issue, Lord Carnwath made the following observation:

> [123] ... To deny the effectiveness of an ouster clause is again a straightforward application of existing principles of the rule of law. *Consistently with those principles, Parliament cannot entrust a statutory decision-making process to a particular body, but then leave it free to disregard the essential requirements laid down by the rule of law for such a process to be effective ...*
>
> [131] ... *it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review.*
>
> [132] *This proposition should be seen as based, not on such elusive concepts as jurisdiction (wide or narrow), ultra vires, or nullity, but rather as a natural application of the constitutional principle of the rule of law (as affirmed by s 1 of the 2005 Act), and as an essential counterpart to the power of Parliament to make law.*
>
> ...
>
> [144] In conclusion on the second issue, although it is not necessary to decide the point, I see a strong case for holding that, *consistently with the rule of law, binding effect cannot be given jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to*

determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law.

[441] It is important to note that the context of the above observation was specifically made in the context of the IPT's power to decide issues of law. Therefore, the observation should not be applicable to s 15B of the POCA which purpose, objective and statutory context, is in relation to preventive detention which limits the non-reviewability of the Board's decisions to decisions made based on facts (ie decisions not based on procedural non-compliance).

[442] The effect of *Privacy International* as can be captured from Lord Carnwath's judgment is that it is for the courts to determine the extent to which an ouster clause restricts review or appeal in any particular situation. However his view failed to consider the intention of Parliament in legislating RIPA, as traditionally it would have been the touchstone in determining the court's approach in interpreting any ouster clause, as it would be with any other statutory provision. The majority expressed concerns that the rule of law being undermined if Parliament is given the power to alter the modes of judicial review of a decision of the Executive when it is undertaken by a 'judicial body' like the IPT which is not the court. In our present context, *Privacy International* is not an authority to establish that national security should be a basis in which judicial review should be totally excluded neither is it an authority to establish that judicial review may be used to scrutinise every aspect of executive's action.

[443] Additionally, in determining the extent to which an ouster clause should be upheld, the court should have regard to the purpose and statutory context and the nature and importance of the legal issue in question.

[444] This, to our mind, requires an assessment of the impugned provision, namely the purpose and objective of POCA, the scheme of POCA via a vis the nature of determination by the Board. We have highlighted earlier the historical background of how art 149 came about, from which s 15B(1) derives its force of law and validity, the scheme of POCA and the acts and decisions that may be made by the Board together with the purpose and the statutory context of POCA. The scheme of POCA deals with preventive detention hence the effect of ouster clause therein may be given a different treatment as it involves national security and question of policy which is within the province of the Executive to determine.

[445] In this case, before the Board can make any order, whether to put a registered person under police supervision or in a detention centre, the Board

must be satisfied that there are reasonable grounds for believing that such a person is a member of any of the registrable categories. The Board's decision is based on the finding of the Inquiry Officer submitted under s 10 and the complete report of the police investigation submitted under s 4A.

[446] The question is can a person who is a member of any of the registrable categories involves a determination of issues of facts, be subjected to the assessment of legality?

[447] We are of the view that such determination is fact-finding, which, according to both cases mentioned above, are beyond the court's intervention, bearing in mind the inquiry by the inquiry officer that may involve consideration of evidence or materials that are not admissible in the ordinary rule of law of evidence or criminal procedure.

[448] It must also be highlighted that the inquiry officer is allowed, subject to the proviso, if he considers it necessary in the public interest or to protect a witness, or his family or associates, to receive evidence in the absence of the person who is subject of the inquiry (s 9(3)).

[449] This goes on to show that there are matters which are sensitive in nature, involving the security and safety of the witnesses involved in the inquiry, which altogether is inappropriate to be made public.

[450] The nature of the subject matter in question involves handling sensitive information. It is not like reviewing other administrative works or decisions where all materials are available for the court's assessment to measure the legality or otherwise of the decision.

[451] In this case, the determination of whether a person is a member of any of the registrable categories is a question of fact, the finding of which may be based on both admissible and inadmissible evidence and on other sensitive information.

[452] *Privacy International* was reviewed, for errors of law involved in the decision by the Tribunal. In the present case, we are dealing with a wholly question of fact.

[453] Hence, by applying *Privacy International*, the ouster clause in s 15B(1) of the POCA can still survive the constitutional challenge in the present appeal. What is of significance is that in *Privacy International* which placed importance on rule of law as a basis in its decision is from *a jurisdiction where there is no written constitution, unlike Malaysia where we have a written FC with specific*

provisions therein on powers of the courts and the Legislatures and where the constitutionality of any impugned provision is tested against the provisions of the FC. But most significant is that, *Privacy International* is not a case which dealt with preventive detention laws and the likes of the provision of art 149 of the FC.

The application of Alma Nudo Atenza with the present appeals

[454] Counsel for the appellants, Encik Najib Zakaria submitted that this court in *Alma Nudo Atenza* had struck down s 37A of the Dangerous Drugs Act 1952 ('the DDA') as being unconstitutional and hence reduced the conviction from one under s 39B of trafficking under the DDA to one of possession under s 39A(2) of the same. Counsel urged this court to act likewise in the present appeal and to release the appellants as they had been detained under an unconstitutional provision. However we are not with counsel on this point because the facts and issues in *Alma Nudo Atenza* are poles apart from our present appeal.

[455] *Alma Nudo Atenza* concerned a decision of the Federal Court which struck down s 37A of the DDA on grounds of double presumption which was invoked by the trial Judge against the accused, as it was prescribed as being disproportionate to the legislative objective of the legislation. In other words it was based on the principle of proportionality. The Federal Court in *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 said at para 46:

> (e) there is prohibition against presumptions in principle, but the principle of proportionality must be observed, a balance must be struck between the general interest of the community and the protection of fundamental rights. The substance and effect of presumptions adverse to an accused must not be greater than is necessary and must be reasonable.
>
> (f) the test to be applied is whether the modification or limitation pursues a legitimate aim and whether it satisfies the principle of proportionality;

[456] In the present appeals *Alma Nudo Atenza*'s principle of proportionality is inapplicable to the facts of the case. Here it is in relation to an ouster clause which was enacted under a special law pursuant to art 149 FC which clearly oust the courts from reviewing the decision of the Board except in procedural non-compliance. Hence the facts, issues and the law are distinct and distinguishable from *Alma Nudo Atenza.*

[457] This court in *Alma Nudo Atenza* also emphasised the importance of the doctrine of the separation of powers, namely, each component of the administration to confine its powers within the confines of their intended limits. The impugned provision prescribes the powers of the court in exercising powers of judicial review. The impugned provision is a federal piece of

legislation and the court is bound to act according to what has been prescribed by the federal law. It is not within the court's powers to impose reliefs which the law does not permit.

Whether s 7B of POCA was complied with (for the applicant Nivesh Nair a/l Mohan)

[458] Section 7B(2) of the POCA states:

> (2) Every member of the Board shall, unless he sooner resigns, hold office for a period not exceeding three years and is eligible for re-appointment.

[459] The appellant alleged that Dato' Abdul Razak bin Musa in his affidavit in reply at para 2 states that the other two members of the Board are Dato' Mohamad Fazin bin Mahmud and DCP Mazupi bin Abdul Rahman. Nowhere in the entire affidavit is it stated the date of appointment of Dato' Mohamad Fazin or Dato DCP Mazupi as members of the Board or when the tenure of their terms of office took effect. This is very crucial as s 7B(2) stipulates that every member of the Board shall hold office for a period not exceeding three years.

[460] It was further ventilated by the appellant on this point by referring to the case of *Tan Teck Guan lwn Lembaga Pencegahan Jenayah & Yang Lain* [2017] MLJU 510 where the appellant therein filed a writ of habeas corpus against his detention vide order dated 26 November 2015. In the aforesaid case, the order was presumably signed by Dato' Mohamad Fazin in 26 November 2015 in his capacity as Deputy Chairman of the Board. Given the date of the order was signed, Dato' Mohamad Fazin's term of office would have expired on 25 November 2018 unless he sooner resigns. There is nothing before the court in our present appeals indicating that he was reappointed following the expiration of his term in office as a member of the Board thereby his continued term in office as of the date made against the appellant here is unlawful. It was submitted that this amounts to a serious breach of the legality of the composition of the Board which, if found to be in breach, renders any order made by the Board null and void. Consequently the appellant has been deprived of his liberty not in accordance with law. Such deprivation is unlawful, as such the writ of habeas corpus is non-discretionary and must be issued by the court.

[461] Coming back to the present appeal by Nivesh Nair a/l Mohan, the aforesaid issue was considered by the learned trial judge in his judgment at p 21, paras 27–33 of *Jld* 1 of the records of appeal and His Lordship had rejected this issue, reason being the appellant never raised this in his affidavit. This issue was raised by the appellant only in his submission. There was no dispute on the date of appointment of Dato' Fazin and/or DCP Mazupi as members of the

Board. The appellant also failed to dispute the reappointment of Dato' Fazin after the expiry of his appointment.

[462] In any event, the appellant had never challenged nor rebutted the averment in the affidavit of Dato' Abdul Razak bin Musa, the Chairman of the Board (appeal records *Jld* 2 p 51 para 2). There was no affidavit in reply by the appellant to rebut the positive averment of the chairman of the Board. Hence, the learned High Court judge deemed it unrebutted by the appellant. It is trite law that in a trial by affidavit, the court held that such positive assertion is deemed to be admitted by the opponent, if such positive averments is unrebutted. This court in *Nagaraja a/l Ponusamy v Menteri Dalam Negeri, Malaysia and Others* [2010] MLJU 32; [2010] 4 CLJ 133, FC at p 137 held that:

> [3] In the circumstances adumbrated, what approach is the court to adopt? The answer to this question is well settled by a legion of authorities we find unnecessary to cite. It is this. Where the deponent to an affidavit makes a positive assertion, which is not inherently incredible or inherently improbable, and his opponent in his affidavit does not credibly deny that allegation, a court should accept the former assertion as standing unrebutted. Now apply that test here.

See also:

(a) *Ng Hee Thoong & Anor v Public Bank Berhad* [1995] 1 CLJ 609;

(b) *Keng Kien Hock v Timbalan Menteri Keselamatan Dalam Negeri Malaysia and other appeals* [2007] 5 MLJ 611 at p 620 para 12; [2007] 5 CLJ 171 at p 183 para 10;

(c) *Kok Kol v Chong Kui Seng & another appeal* [2010] 2 CLJ 481 para 13.

[463] This issue would have merits only if there is no evidence or averments by the respondent on this issue. However in this appeal, as at p 51 para 2 of the appeal records *Jld* 2, ie the affidavit in reply by Dato' Abdul Razak bin Musa made positive averments on the appointment of the Chairman and the committees of the Board under section 7B of POCA.

[464] In relation to this particular issue, ss 41 and 50 of the Interpretation Acts 1948 and 1967 are equally relevant which read:

> 41 Powers of certain bodies not affected by vacancy, etc.
>
> A board, commission, committee or similar body (whether corporate or unincorporated) established by or under a written law may act notwithstanding any vacancy in its membership; and its proceedings shall not be invalidated by —
>
> (a) any defect afterwards discovered in the appointment or qualification of a person purporting to be a member; or

(b) any minor irregularity in the convening or conduct of a meeting; or

(c) the presence or participation of a person not entitled to be present or participate.

...

50 Appointment may be made by office and with retrospective effect.

Where under any written law the Yang di-Pertuan Agong, a State Authority, a Minister or any other authority is empowered to appoint a person to exercise any function, to be a member of any board, commission or similar body or to be or do any other thing, he may —

(a instead of appointing a person by name , appoint the holder of an office by the term designating the office; and

(b If he thinks fit, make the appointment with retrospective effect to a date not earlier than the commencement of the law under which it is made.'

[465] In any event, this issue raised does come within the ambit of procedural non compliance as envisaged under s 15B(1) of POCA.

[466] In *Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 2 MLJ 631; [2005] 3 CLJ 914 where the appellant applied for the issuance of a writ of habeas corpus, contending that the order issued by the Deputy Minister of Home Affairs Malaysia ('the Deputy Minister'), the first respondent, pursuant to s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') was invalid on the following grounds: (i) the Deputy Minister did not consider whether criminal prosecution ought to be taken against him; and (ii) the ground of detention was stale and remote in point of law to support his detention under the Ordinance. The application was dismissed at first instance and he subsequently appealed to the Federal Court.

The panel of the Federal Court expressed concern that similar cases involving challenges to detention under the Ordinance; the Internal Security Act 1960 ('ISA 1960'); and the Dangerous Drugs (Special Preventive Measures) Act 1985 ('DD (SPM) Act 1985'), were often decided without reference to relevant statutory provisions with the result that material statutory amendments were not given effect.

Hence, the Federal Court found it necessary to emphasise the importance of several statutory amendments relating to judicial review in those statutes, specifically the amendments relating to the Ordinance. We can do no better than what has been held by the Federal Court, speaking through Abdul Hamid Mohamad FCJ, dismissed the appeal and held that:

A [1] The Ordinance was amended by the Emergency (Public Order and Prevention of Crime) (Amendment) Act 1989 ('Act A740') which came into force on 24 August 1989. Similar amendments were also made to the ISA 1960 and the DD (SPM) Act 1985, respectively by Act A739 and Act A738. Act A740, inter alia, inserted new ss 7C and 7D into the
B Ordinance, which clearly restricted challenges to detention orders made by the Minister under s. 4(1) of the Ordinance to grounds of non-compliance with any procedural requirement, and nothing else.

[2] The cases decided prior to the amendments, ie, 24 August 1989, showed various grounds upon which the detention orders were challenged. Mala
C fide appeared to be the most important ground. Courts seemed to place lesser importance on procedural non-compliance unless the requirement was mandatory in nature. However, the amendments appear to have reversed the position by limiting the ground to only one ground — non-compliance with procedural requirements.

D [3] Courts must give effect to the amendments. Thus, in a habeas corpus application where the detention order of the Minister is made under s. 4(1) of the Ordinance or, under equivalent provisions in the ISA 1960 or DD (SPM) Act 1985, the first thing the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural
E non-compliance. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof.

F [4] In the instant case, the grounds forwarded for habeas corpus were clearly not within the ambit of the term 'procedural non-compliance'. There appeared to be no provision in the law or the rules — and neither was the Federal Court referred to any such provision-that required the Minister to
G consider whether criminal prosecution ought to be taken against the appellant or that the order had to be made within a certain time from the date of the alleged criminal acts. Thus, the grounds were not such that could be relied on in an application for habeas corpus, by virtue of ss. 7C(1) and 7D(c) of the Ordinance. On this ground alone, the application should be dismissed.

H

[467] Further, premised on *Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors* [2020] 1 MLJ 351; [2020] 1 CLJ 747 where this court considered the application of the provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985 (1985 Act), and held that:

I

> [17] It must be borne in mind that the ambit of judicial review of the ministerial detention order issued under the 1985 Act is restricted and curtailed by ss. 11C and 11D which provides as follows:
>
> 11C Judicial review of act or decision of Yang di-Pertuan Agong and Minister

> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or finding or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

> [18] It is apparent that the provisions of ss 11C and 11D were inserted in the 1985 Act with the intention to oust the court's power to review all acts done or decision made in the exercise of the Minister's discretionary powers except on non-compliance with any procedural requirements (see: *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] MLJU 667; [2005] 3 CLJ 914; *Mohd Faizal Haris*.

> [19] Before departing from the present appeal, we would like to emphasize that under the provision of 1985 Act, non-compliance with any procedural requirement are the only safeguard available to detenu since the court is not allowed to go beyond the subjective satisfaction of the Minister. Therefore, the procedure requirements must be strictly and faithfully complied with.

[468] In the circumstances, Nivesh Nair a/l Mohan failed to show that there has been non-compliance of any procedural requirements.

CONCLUSION

[469] We need to be reminded that art 4(1) of the FC states that the FC is the supreme law of the federation. It provides that *any post-Merdeka law inconsistent with the provision of the FC is void*. Article 149 of the FC is part and parcel of the very fabric that clothes the FC, which empowers Parliament to pass special preventive laws to prevent any substantial body of persons from taking or threatening the commission of the categories of acts stipulated under para (1)(a)–(f). Section 15B of the POCA was enacted under art 149 of the FC. It derives its force of law and validity from art 149 of the FC. Nowhere, in the submissions of the appellants was it ever mentioned that s 15B is inconsistent with any of the provisions of the FC. Although the appellants submitted that s 15B is ultra vires art 121(1), that cannot be so because art 121(1) confers powers on Parliament to set up an institutionalised mechanism with the power and jurisdiction on the extent and manner which is derived from federal law. POCA is the federal law, which provides the extent and manner as to how that power of the courts is to be exercised. POCA does not remove judicial power of the courts and neither does it confer judicial powers to another non judicial body, as in *Semenyih Jaya* (powers given to assessors) or *Privacy International* (powers given to Investigatory Powers Tribunal). Hence how could POCA be inconsistent or ultra vires art 121(1) of the FC?

[470] It has been perceived by certain quarters that on the basis of *Semenyih*

Jaya, *Sivarasa Rasiah* and *Indira Ghandi*, courts can prevent Parliament from destroying the 'basic structure' of the FC. In the process whatever provision that is being challenged, can be struck down by the courts as being unconstitutional. However, the concept of basic structure, may be applicable where the impugned legislation seeks to amend the Constitution. Suffice for us to reiterate here that the statutes under scrutiny in the trilogy of cases were not statutes passed by Parliament to amend any of the provisions of the FC.

[471] No provision of the law can be struck out if it is not inconsistent with the FC, although it is inconsistent with a doctrine. Doctrines are not provisions of the FC, hence one cannot use doctrines/concepts to premise the inconsistency of any provision of the law so as to strike it down as being unconstitutional. This runs contrary to the express provision of art 4(1) which provides that '... any law passed after Merdeka day which is *inconsistent with this Constitution* shall, ... be void'. The ultimate test for constitutionality of any impugned provision is the FC itself.

[472] We do not deny the need for separation of powers as advocated by Baron de Montesquieu as the concentration of power in one hand leads invariably to tyrannical and autocratic tendencies in those welding power, in the public sphere. On the other hand, it is also undesirable if judges step into the shoes of the Executive and that of the Legislature in the guise of novel interpretation of the laws. It has been said that the dividing line between judicial activism and judicial overreach is a very thin one. Assuming over the function of the Executive in areas, not within the purview of the courts and where the courts of justice is ill equipped to decide, is certainly a judicial overreach. In the words of Thomas Jefferson when he was commenting on judicial despotism, that 'judicial activism reduces the Constitution into mere wax in the hands of the Judiciary which they may twist and shape into any form they please.'

[473] Section 15B of the POCA was enacted within the limit of what art 149 of the FC allows. Article 149 gives Parliament the legislative power to enact POCA with the effect of curtailing fundamental liberties guaranteed under arts 5, 9, 10 and 13, which indicates the stature that is given to the law enacted under it.

[474] Given the reasons as aforesaid, s 15B of the POCA which is not a complete ouster clause but only limits the exercise of judicial review to procedural non-compliance, is not ultra vires art 121(1) of the Federal Constitution ('the FC'). We are not persuaded by the arguments forwarded by counsels for the appellants to support their proposition on the unconstitutionality of s 15B of the POCA.

[475] Therefore, s 15B of the POCA is not unconstitutional and is therefore valid. As the appeals by the five appellants who were represented by Encik Najib Zakaria, hinged their appeal on this single issue of constitutionality of s 15B(1) of the POCA, their case therefore falls.

[476] As for the appellant, Nivesh Nair a/l Mohan who was represented by Dato' Seri Gopal Sri Ram, his appeal was dependent on the constitutionality issue and the procedural non-compliance issue, he failed to raise any procedural non-compliance in the decision making by the Board.

[477] Consequently, given the aforesaid, the appeals by all the appellants are hereby dismissed.

[478] My learned brother and sister judges in the panel, Dato' Abang Iskandar bin Abang Hashim, CJSS, Datuk Vernon Ong Lam Kiat, FCJ and Dato' Sri Hasnah bt Dato' Mohammed Hashim, FCJ have read this judgment and have expressed their agreement to it, to form the majority judgment of this court.

Appeals dismissed.

Reported by Ashok Kumar